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In The

Supreme Court of the United States

October Term, 1998

EDWARD M. STEPHENS, M.D., JOSÉ A. YARYURA-TOBIAS, M.D., JUDITH GREEN Ph.D., FUGEN NEZIROGLU, Ph.D., ONA ROBINSON, Ph.D., AGNES WOHL, C.S.W., and THE ON-STEP INSTITUTE FOR MENTAL HEALTH RESEARCH, INC., individually and on behalf of all others similarly situated,

Petitioners,

v.

CMG HEALTH, FHC OPTIONS, INC., FOUNDATION HEALTH PSYCHCARE SERVICES, INC., GREEN SPRING HEALTH SERVICES, INC., HUMAN AFFAIRS INTERNATIONAL, INC., MERIT BEHAVIORAL CARE CORP., MCC BEHAVIORAL CARE INC., UNITED BEHAVIORAL SYSTEMS, INC., and VALUE BEHAVIORAL HEALTH, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Federal Rules of Civil Procedure require more to be pleaded than the short and plain statement of the claim showing plaintiffs are entitled to relief in an antitrust action?

2. Whether Federal Rule of Civil Procedure 15(a) gives a plaintiff an absolute right to amend a complaint at least once where it has been dismissed as insufficiently particular under Federal Rule of Civil Procedure 8(a)(2)?

RULE 29.6 LISTING

Petitioner The On-Step Institute for Mental Health Research, Inc. has no parent or subsidiary company.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.6 LISTING ii

PETITION FOR WRIT OF CERTIORARI..... 1

OPINIONS BELOW..... 1

JURISDICTION..... 1

FEDERAL STATUTES INVOLVED..... 2

STATEMENT OF THE CASE..... 3

A. OVERVIEW 3

B. FACTUAL BACKGROUND..... 5

1. The Class Action Complaint..... 5

2. The Magistrate Judge's Report 7

3. The District Court's Dismissal Order 8

4. The Second Circuit's Order..... 10

5. Basis for Federal Jurisdiction Below 11

REASONS WHY THE WRIT SHOULD BE GRANTED 12

I. THE COMPLAINT WAS SUFFICIENT UNDER RULE 8(a)..... 13

II. PETITIONERS HAD A RIGHT TO FILE AN AMENDED COMPLAINT..... 19

CONCLUSION 22

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982) 15, 16

Barr v. The Dramatists Guild, Inc., 573 F. Supp. 555 (S.D.N.Y. 1983) 18

Brader v. Allegheny General Hospital, 64 F.3d 869 (3d Cir. 1995) 4, 12, 17

Breier v. Northern California Bowling Proprietors' Ass'n, 316 F.2d 787 (9th Cir. 1963) 5, 13

Broadcast Music, Inc. v. Columbia Broadcasting System, 441 U.S. 1 (1979) 15

Conley v. Gibson, 355 U.S. 41 (1957) 11, 16

Doe v. United States, 58 F.3d 494 (9th Cir. 1995)... 13, 21

Dwares v. The City of New York, 985 F.2d 94 (2d Cir. 1993) 5, 13, 20

Estate Construction Co. v. Miller & Smith Holding Co., 14 F.3d 213 (4th Cir. 1994) 12, 17, 18

FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990) 14

Hammes v. AAMCO Transmissions, Inc., 33 F.3d 774 (7th Cir. 1994) 4, 12, 16, 17

Heart Disease Research Foundation v. General Motors Corp., 463 F.2d 98 (2d Cir. 1972) 11, 14, 16

Hill v. City of Indianapolis, 17 F.3d 1016 (7th Cir. 1994) 5, 20

Hishon v. King & Spaulding, 467 U.S. 69 (1984)..... 17

TABLE OF AUTHORITIES – Continued

Page

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977)..... 18

Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163 (1993)..... *passim*

Lundy v. Adamar of New Jersey, Inc., 34 F.3d 1173 (3d Cir. 1994) 17

Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948)..... 15

MCM Partners, Inc. v. Andrews-Bartlett & Associates, 62 F.3d 967 (7th Cir. 1995).....14, 17

Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985)..... 15

Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961)..... 14

United States ex rel. Richard Saaf v. Lehman Brothers, 123 F.3d 1307 (9th Cir. 1997)..... 5, 13, 20, 21

STATUTES

Sherman Anti-trust Act, United States Code, Title 15 § 1..... 3, 11, 14, 15

Clayton Act, United States Code, Title 15 §§ 15 & 26 3

United States Code, Title 28 § 1254(1) 2

Federal Rule of Civil Procedure Rule 8(a) 4, 13, 14, 21

Rule 8(a)(2)..... 2

Rule 8(e)(1)..... 2

TABLE OF AUTHORITIES – Continued

Page

Rule 9(b) 14, 17

Rule 12(b)(6) 2, 3, 11, 13, 19, 20

Rule 15(a) ..... *passim*

PETITION FOR WRIT OF CERTIORARI

Petitioners are mental healthcare providers Edward M. Stephens, M.D., José A. Yaryura-Tobias, M.D., Judith Green, Ph.D., Fugen Neziroglu, Ph.D., Ona Robinson, Ph.D., Agnes Wohl, C.S.W., and The On-Step Institute for Mental Health Research, Inc. ("Petitioners" or "Mental Healthcare Providers") who respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.[1]

OPINIONS BELOW

The November 16, 1998 Summary Order of the Court of Appeals is unpublished and entitled *Stephens v. CMG Health*. App.1a-4a. The decision of the district court and the Report and Recommendations of the Magistrate Judge referred to herein are unreported. App.5a-7a (District Court); App.8a-43a (Magistrate Judge).

JURISDICTION

The United States Court of Appeals for the Second Circuit entered a Summary Order on November 16, 1998, in which it affirmed the district court's Order filed on

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[1] Respondents are managed mental health organizations CMG Health, FHC Options, Inc., Foundation Health PsychCare Services, Inc., Green Spring Health Services, Inc., Human Affairs International, Inc., Merit Behavioral Care Corp., MCC Behavioral Care Inc., United Behavioral Systems, Inc., and Value Behavioral Health, Inc. ("Respondents" or "MMHOs").

May 12, 1998, dismissing petitioners' class action complaint with prejudice. This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

FEDERAL STATUTES INVOLVED

This case involves the following Federal Rules of Civil Procedure:

Rule 8(a)(2), provides, that,

> A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief. . . .

Rule 8(e)(1), provides, in pertinent part, that,

> Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

Rule 12(b)(6), provides, in pertinent part, that,

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted. . . . A motion making any of these defenses shall be made before pleading if a further pleading is permitted.

Rule 15(a), provides, in pertinent part, that,

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served. . . . Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

STATEMENT OF THE CASE

A. OVERVIEW

This case involves the extraordinary dismissal, with prejudice, under Federal Rule of Civil Procedure 12(b)(6), of an original class action complaint brought under Section 1 of the Sherman Anti-trust Act, 15 U.S.C. § 1 and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 & 26, and denial of leave to file a first amended complaint. The complaint, brought by petitioners, mental healthcare providers (psychiatrists, psychologists and social workers) on behalf of themselves and all others similarly situated, alleges that respondents, national managed mental healthcare organizations who control mental healthcare treatment for approximately 80 million Americans, engaged in a price-fixing conspiracy and group boycott in violation of the antitrust laws. The complaint is not an attack on managed care *per se*. App.44a-45a.

Respondents conspired to undertake various illegal and immoral acts to ensure their goal of minimizing the mental healthcare they would authorize. Respondents, who are horizontal competitors, jointly lowered and fixed

the professional fees that they would pay mental healthcare providers. App.56a-57a at ¶42. Respondents jointly cut costs by requiring medical treatments that were inappropriate for their patients. *Id.* Respondents also engaged in a group boycott of those providers who did not accept their policies. *Id.* As a result of these and other alleged anti-competitive acts, the fees paid to petitioners and class members have been artificially lowered and fixed at non-competitive levels throughout the United States, and price competition for their services has been restrained and eliminated. App.58a at ¶43. Effective treatments for mental health problems have been virtually eliminated. Petitioners and the class members have suffered immense financial loss and consumers have been denied access to desperately needed mental healthcare services. App.44a-45a at ¶1.

In dismissing the complaint with prejudice, the lower courts applied an inappropriate heightened pleading standard for antitrust conspiracies and injury in *per se* price-fixing cases, which the Second Circuit adopted in its summary decision. The level of pleading detail the lower courts demanded violates the notice-pleading requirements of Federal Rule of Civil Procedure 8(a), this Court's reaffirmation of those well-established requirements in its 1993 decision in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), and other Circuits' application of that decision and Rule 8(a) to antitrust complaints.[2]

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[2] *See Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 778 (7th Cir. 1994) (plaintiff not required to plead particulars of antitrust claim); *Brader v. Allegheny General Hospital*, 64 F.3d 869, 876-77 (3d Cir. 1995).

The lower courts refused petitioners even a single amendment of the complaint, contrary to the language of Federal Rule of Civil Procedure 15(a), which provides for one amendment "as of right." The courts viewed plaintiffs' right under Rule 15(a) as subject to annulment at the courts' discretion. They i sisted on petitioners providing an offer of proof as to the nature and detail of any possible amendment, then, without the benefit of discovery, denied petitioners' request for leave to amend on grounds that any such amendment would be "futile" and "prejudicial" to respondents. The courts' actions, although consistent with prior Second Circuit decisions[3], were wrong under the law, and in direct conflict to the correct procedure followed by other circuits.[4]

B. FACTUAL BACKGROUND

1. The Class Action Complaint

Petitioners are psychiatrists, psychologists and social workers, and an association of providers of mental healthcare services. The nine respondents are managed

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[3] *See Dwares v. The City of New York*, 985 F.2d 94 (2d Cir. 1993) (Absolute right to amend once under Rule 15(a) does not survive final order dismissing original complaint under Rule 12(b)(6)).

[4] *See Breier v. Northern California Bowling Proprietors' Ass'n*, 316 F.2d 787, 789 (9th Cir. 1963) (neither the filing nor granting of a motion to dismiss before answer terminates the right to amend); *United States ex rel. Richard Saaf v. Lehman Brothers*, 123 F.3d 1307, 1308 (9th Cir. 1997); *Hill v. City of Indianapolis*, 17 F.3d 1016, 1018 (7th Cir. 1994) (plaintiff had absolute right to amend under Rule 15(a) because motion to dismiss is not responsive pleading).

mental healthcare organizations who contract directly with petitioners and other similarly situated providers of mental healthcare throughout the nation. App.44a-45a, 47a-54a, 58a at ¶¶1, 12-20, 23-29, 33, 44.

The complaint describes the industry in which respondents operate. The managed care organizations that presently dominate the field treat mental health matters differently than other health-related matters. They refer mental health matters to a specialized group of companies called managed mental healthcare organizations ("MMHOs"). By contract with the managed care organizations, MMHOs (which include respondents) determine the quality and quantity of mental health treatment that will be authorized for people who subscribe to the particular managed care network. MMHOs simultaneously pay for the mental health they authorize, and receive from the managed care organizations fixed periodic payments based on the number of subscribers ("capitated" payments) as compensation for their services. This arrangement is conducive to a reduction in the quality, quantity and cost of mental health services the MMHOs will authorize in order to increase their net profits. App.54a-55a at ¶¶33-38.

In sum, the complaint, read as a whole, alleges that during the four years prior to, and continuing to the present, respondent MMHOs conspired to, among other illegal and immoral acts: (1) fix the cost of fees they would pay for professional services for mental healthcare provided by petitioners and the class members, at artificially low and noncompetitive levels throughout the United States; (2) engage in a group boycott through exclusion and termination of providers who did not

accept the cost-cutting methods, "gag" orders and other policies designed to reduce the quality and quantity of mental healthcare available to subscribers of the managed care networks, and to maximize their own net profits; and (3) refrain from price competition with one another or competing for professional services for mental health care.

The complaint alleges further that respondents undertook these acts jointly and in concert, that they met together frequently, had the opportunity to communicate with one another about fees and other terms of engagement, and acted through various professional associations and otherwise at meetings and through standard forms of communication. The injury and damages alleged in the complaint include: (1) the restraint of trade in that petitioners and class members have been unable to sell their professional services at prices determined by free and open competition; (2) petitioners and class members have received less for their services than they would have received in a free and open competitive market; and (3) consumers are being denied access to mental healthcare services. The complaint further alleges a national impact on interstate commerce.

2. The Magistrate Judge's Report

The Magistrate Judge issued a report recommending that the complaint be dismissed with prejudice and that leave to amend be denied. The Magistrate Judge based her decision on a faulty application of the "Rule of Reason" in this present *per se* horizontal price fixing case, and a heightened pleading standard for antitrust violations.

She found petitioners' allegations of conspiracy inadequate because they do not include examples of "conscious parallelism," details regarding the actual fees paid by any of the respondents, a comparison of fee structures between them, allegations that the associations in which respondents were involved set fees or allocated the geographic market, or details of specific meetings, the identities of responsible individuals, the terms of the alleged agreements, or any specific acts respondents took in furtherance of the conspiracy. She found also that petitioners fail to allege antitrust injury because they claim only economic injury to themselves, and not that consumers are harmed thereby. App.21a-22a, 28a-34a.

The Magistrate Judge further denied petitioners leave to file a first amended complaint. She did not address the language of Federal Rule of Civil Procedure 15(a) providing all parties an absolute right to amend a complaint at least once before a responsive pleading is filed. She concluded that granting leave to amend would serve no purpose because petitioners had not advised the court of additional facts that would support a viable antitrust claim, even though she had never requested submission of an amended complaint or disclosure of new supporting facts.

3. The District Court's Dismissal Order

After petitioners filed objections to the Magistrate Judge's Report, the district court held a hearing on April 30, 1998, at the end of which she announced her ruling. The district court's subsequent written order, which adopted the Magistrate Judge's previously stated reasons

and the Magistrate Judge's Report, dismissed the complaint with prejudice, then denied leave to amend on the grounds that amendment would be futile and would prejudice the defendants. App.5a-7a.

At the hearing, the district court repeatedly asked petitioners' counsel to identify additional factual details establishing a price-fixing conspiracy among the respondents that would be included in an amended complaint. Counsel discussed errors in the Magistrate Judge's Report, referred the district court to his objections thereto, and specifically identified additional factual details establishing that one of the respondents had directly urged the others to jointly lower and fix providers' fees, calling it a "universal fee," and that the respondents had indeed done so.

Counsel, pressed by the district court, then identified some results of the minimal discovery that had been allowed. Counsel identified corroborating documents, which the district court, at approximately 5:00 p.m. ordered him to produce immediately. When counsel responded that he did not have the documents with him, the district court demanded that he order someone in his office to fax them, which was impossible because counsel is a sole practitioner. The district court then insisted that counsel identify even more factual detail, such as the point at which each respondent lowered its rates, and the actual rate, as well as descriptions of documents and oral recordings evidencing price-fixing that counsel had recently obtained from defendants' employees. Counsel's attempts to oblige were rebuffed by the district court.

With respect to antitrust injury, the district court suggested that consumers could avail themselves of the providers' services outside of the managed care network, albeit at increased rates, or that other companies could come in and compete. When counsel pointed out that most Americans could not afford to do so, and that respondents had a lock on the industry, the district court was skeptical of any barrier to entry by new companies in the market.

At the end of the hearing the district court dismissed the complaint with prejudice, and although she indicated that the newly identified facts presented by counsel may have supported repleading earlier, the delay in producing the information precluded repleading at that point. The district court adopted the Magistrate Judge's Report, and concluded, without explanation, that any amendment would be futile. In her subsequent order, the district court added that an amended complaint would prejudice respondents because petitioners had not to date submitted an amended complaint and, thus, respondents' resources had been spent challenging the original complaint, and not an amended version throughout the pendency of the motion to dismiss.

4. The Second Circuit's Order

In an unpublished Summary Order filed November 16, 1998, the Second Circuit Court of Appeals affirmed the district court's order in its entirety. The Second Circuit found petitioners' complaint insufficient because it alleged a "bare bones statement of conspiracy or of injury under the antitrust laws without any supporting

facts. . . . " In doing so, the Second Circuit relied on *Heart Disease Research Foundation v. General Motors Corp.*, 463 F.2d 98, 100 (2d Cir. 1972). This decision had been implicitly overruled by this Court's unanimous decision in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993) (Rehnquist, C.J.) which held, in accord with *Conley v. Gibson*, 355 U.S. 41 (1957), that "only 'a short plain statement of the claim showing that the pleader is entitled to relief' " is required. The Second Circuit also found that the district court was within its discretion in denying leave to amend because an amendment would be futile and prejudicial. App.1a-4a.

5. Basis for Federal Jurisdiction Below

Petitioners filed a class action complaint seeking damages and injunctive relief for violations of the Sherman Anti-trust Act on October 15, 1996. App.44a-61a. Respondents filed a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) on January 10, 1997. Petitioners opposed, asking in the alternative for an opportunity to file a first amended complaint. The matter was referred to Magistrate Judge Naomi Reice Buchwald, who issued a Report and Recommendation concluding that the complaint was insufficient, that it should be dismissed with prejudice, and that leave to replead should be denied. App.8a-43a. Petitioners filed objections to that report.

After a hearing on April 30, 1998, at which United States District Judge Kimba M. Wood demanded that petitioners' counsel identify detailed facts to support an

amended complaint, as well as produce supporting documents, the district court granted respondents' motion and denied leave to replead. The district court's Order, dismissing the complaint with prejudice and denying leave to replead on grounds of futility and prejudice, was filed on May 12, 1998. App.5a-7a. Petitioners' notice of appeal from that final order was timely filed on May 27, 1998.

REASONS WHY THE WRIT SHOULD BE GRANTED

This petition should be granted to address a conflict between the Second Circuit's decision in this case and this Court's unanimous decision in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993) and the decisions of at least two other Circuit Courts of Appeals in decisions following *Leatherman*: *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 778 (7th Cir. 1994) (plaintiff not required to plead particulars of antitrust claim); *Brader v. Allegheny General Hospital*, 64 F.3d 869, 876-77 (3d Cir. 1995). The Second Circuit's decision does, however, find support in a Fourth Circuit decision that calls for pleading detail far in excess of that required by the Seventh and Third Circuit Courts of Appeals, as well as this Court. *See Estate Construction Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 221 (4th Cir. 1994). Thus, a conflict exists not only between this Court's decisions and the Second Circuit standards but also between the Circuits.

Granting this petition is also necessary to resolve yet another conflict between the Circuits. The Second and Ninth Circuit Courts of Appeals have diametrically

opposed decisions on the application of Federal Rule of Civil Procedure 15(a). The Second Circuit has held that a plaintiff's right to file a single amended pleading under Rule 15(a) does not survive a district court's final order of dismissal under Rule 12(b)(6). *See Dwares v. The City of New York*, 985 F.2d 94, 101 (2d Cir. 1993). The lower courts in this case treated petitioners' right to amend their pleading at least once as within the district court's discretion, not a matter of right established by the Federal Rules of Civil Procedure. The district court denied petitioners their right to file an amended complaint post-dismissal of the original pleading, in keeping with the *Dwares* decision. The Second Circuit affirmed. These decisions conflict directly with decisions from the Ninth Circuit Court of Appeals. The Ninth Circuit, in *United States ex rel. Richard Saaf v. Lehman Brothers*, 123 F.3d 1307, 1308 (9th Cir. 1997), held that "[n]either the filing nor granting of [a motion to dismiss] before answer terminates the right to amend; an order of dismissal denying leave to amend at that stage is improper." *See also Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995); *Breier v. Northern California Bowling Proprietors' Ass'n*, 316 F.2d 787, 789 (9th Cir. 1963).

I. THE COMPLAINT WAS SUFFICIENT UNDER RULE 8(a)

Chief Justice Rehnquist, writing for a unanimous Court in *Leatherman*, held that the Federal Rules of Civil Procedure [Rule 8(a)] require only a short and plain statement of a claim showing entitlement to relief to survive a motion to dismiss. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993).

A plaintiff is not required to plead the particulars of his claim, with the exceptions listed in Federal Rule of Civil Procedure Rule 9(b), which do not include violations of the Sherman Anti-trust Act.

The Second Circuit and the district court violated this standard by demanding that petitioners plead extensive evidentiary details and produce documents to avoid dismissal, a *de facto* heightened pleading standard condemned by this Court in *Leatherman* and by at least two other Circuit Courts of Appeals. The instant decisions were based on the earlier Second Circuit decision in *Heart Disease Research Foundation v. General Motors Corp.*, 463 F.2d 98 (2d Cir. 1972), finding "bare bones" pleading in antitrust cases is insufficient under Rule 8(a). *Id.* at 100. That decision was implicitly overruled by this Court's decision in *Leatherman*. Under the correct standard, petitioners' class action complaint sufficiently alleges a violation of the Sherman Anti-trust Act and injury. This is "all the law requires." *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 660 (1961).

Section 1 of the Sherman Anti-trust Act, forbids "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States." To show a violation of Section 1, a plaintiff must allege either that the contract, combination, or conspiracy consisted of price-fixing, boycotts or other acts resulting in a *per se* violation of the Act, or that it unreasonably restrained competition in a relevant market. *See FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 436 n.19 (1990); *see also MCM Partners, Inc. v. Andrews-Bartlett & Associates*, 62 F.3d 967, 976 (7th Cir. 1995).

"[A]greements among competitors to fix prices on their individual goods and services are among those concerted activities . . . " that are considered *per se* illegal under Section 1 of the Sherman Anti-trust Act. *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1, 8 (1979); *see Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 234 (1948) (buyer conspiracy unlawful). Also, "[c]ertain concerted refusals to deal or group boycotts are so likely to restrict competition without any offsetting efficiency gains that they should be condemned as *per se* violations of § 1 of the Sherman Antitrust Act." *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 290 (1985).

Petitioners allege that the respondents engaged in a horizontal conspiracy to lower and fix the maximum prices they would pay providers for mental health services. Petitioners have thus pled a *per se* violation of the antitrust laws. *See, Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982) (maximum fee price-fixing agreement among horizontal competitors is *per se* unlawful). As this Court observed in *Maricopa County*,

> [i]n this case the [*per se*] rule is violated by a price restraint that tends to provide the same economic rewards to all practitioners regardless of their skill, their experience, their training, or their willingness to employ innovative and difficult procedures in individual cases. Such a restraint also may discourage entry into the market and may deter experimentation and new developments by individual entrepreneurs.

Id. at 348. The courts in this case disagreed, based on the wrongheaded application of a heightened pleading standard to antitrust complaints, as well as a plain misapplication of antitrust law.

In *Leatherman*, this Court reaffirmed its earlier decision in *Conley v. Gibson*, 355 U.S. 41 (1957), that:

> The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is a "short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

507 U.S. at 168 (internal citations omitted). Petitioners did just that. They pled facts establishing: (1) the relevant time period of the violations; (2) the respondents' identities; (3) the fact and nature of the conspiracy; (4) the means and opportunity; and (5) the antitrust injury.[5] This is more than enough under Rule 8(a) and *Leatherman*. Indeed, the detail plaintiffs provided would be enough even under a heightened pleading standard.

The lower courts' decision and *Heart Disease Research* also directly conflict with decisions from other circuits post-*Leatherman*. In *Hammes v. AAMCO Transmissions, Inc.*,

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[5] This case is not just about providers bemoaning a cut in fees. It is about doctors and other mental health providers being frozen out of a competitive market. Managed care does not have some special dispensation exempting it from the antitrust laws that were painstakingly developed to protect the concept and the application of free enterprise. Managed care organizations like to tout their business base, yet as businesses they must comply with the law just like other businesses.

33 F.3d 774 (7th Cir. 1994), the Seventh Circuit emphasized the application of a liberal pleading standard in affirming a complaint alleging an antitrust conspiracy. In an opinion by Chief Judge Posner, the Seventh Circuit, citing *Leatherman*, found that the plaintiffs were not required by Rule 8(a) to "plead the particulars of [their] claim." *Id.* at 778. The Seventh Circuit emphasized, "[a] nascent movement in the lower courts to add judge-made exceptions to those listed in Rule 9(b), was scotched by the Supreme Court in *Leatherman*." *Id.* (citation omitted). In addressing the complaint's allegations of conspiracy, in particular, the Seventh Circuit stated, "the complaint's description of the defendants' practice is certainly consistent with an antitrust conspiracy, and no more is required at this stage . . . " *Id.* at 782 (citing *Hishon v. King & Spaulding*, 467 U.S. 69 (1984)). *See also MCM Partners*, 62 F.3d at 976 (minimal allegations of "relevant market" sufficient).

The Third Circuit concurs with the Seventh Circuit in rejecting heightened pleading requirements in cases other than those listed in Federal Rule of Civil Procedure Rule 9(b). In *Brader v. Allegheny General Hospital*, 64 F.3d 869 (3d Cir. 1995), the Third Circuit upheld an antitrust complaint, noting that other courts' "impatience with the notice pleading embodied in the Federal Rules [has been] foreclosed by the Supreme Court's decision in *Leatherman*." *Id.* at 876. *See also Lundy v. Adamar of New Jersey, Inc.*, 34 F.3d 1173, 1194 (3d Cir. 1994) (Becker, J. concurring in part and dissenting in part) ("bare bones" pleading sufficient under Rule 8(a)).

To the extent that the Fourth Circuit may hold otherwise, it should be overruled. *See Estate Construction Company v. Miller & Smith Holding Co.*, 14 F.3d 213 (4th Cir.

1994). In that case, the Fourth Circuit dismissed an antitrust complaint alleging conspiracy where the plaintiffs failed to plead specific "communications, meeting, or other means through which one might infer the existence of a conspiracy. Nor does [the complaint] provide any 'details of the time, place and alleged effect of the conspiracy.' " *Id.* at 221. (citation omitted). Under Rule 8(a) and this Court's decisions, such detail is not required to plead an antitrust conspiracy.

Voluminous detail is not required to establish the existence of antitrust injury. Petitioners alleged in their complaint that the respondent MMHOs' illegal acts caused the following injury and damage: (1) restraint of trade in that petitioners and class members have been unable to sell their professional services at prices determined by free and open competition; (2) petitioners and class members have received less for their services than they would have received in a free and open competitive market; and (3) consumers are being denied access to appropriate mental healthcare services. As the court in the similar case of *Barr v. The Dramatists Guild, Inc.*, 573 F. Supp. 555 (S.D.N.Y. 1983) noted, "[a] plaintiff in a price-fixing case is not required to allege facts beyond these to show antitrust injury." *Id.* at 559 (citing *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977)).[6]

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[6] In *Barr*, the district court found antitrust injury properly pled where the complaint alleged only that the defendant producers had conspired to fix the playwrights' compensation "at artificially low and non-competitive levels" and "to enforce unfavorable terms and conditions in the contracts that are offered to playwrights." *Id.* at 558. These allegations are remarkably similar to those alleged in the instant case.

Petitioners sufficiently pled antitrust conspiracy and injury. In dismissing petitioners' complaint with prejudice, the lower courts violated the Federal Rules and this Court's decisions, particularly the *Leatherman* decision. The petition should be granted to address this important question, in order to clarify the pleading standard for antitrust plaintiffs suing in the Second Circuit and to resolve Second and the Fourth Circuits' apparent conflict with the Seventh and Third Circuits and this Court.

II. PETITIONERS HAD A RIGHT TO FILE AN AMENDED COMPLAINT

Even if petitioners' complaint had been insufficient, which it was not, petitioners were entitled to at least one opportunity to amend pursuant to Federal Rule of Civil Procedure 15(a), which provides, in pertinent part,

> A *party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served.* . . . Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. (emphasis added).

The lower courts denied petitioners their absolute right to amend. Under the Second Circuit's approach, once a motion to dismiss under Rule 12(b)(6) has been brought, and granted, a plaintiff's right under Rule 15(a) to amend once is annulled. This is not the law Congress enacted, it is not the law in at least two other Circuits, and it is plainly wrong.

The lower courts exacerbated the error by denying petitioners' request (in keeping with Second Circuit requirements) for leave to amend, before the parties had engaged in substantial discovery, on the ground of prejudice due to petitioners' not submitting an amended complaint before resolution of the motion to dismiss. This rationale turns both Rules 12(b)(6) and 15(a) on their heads; the Rules provide that a plaintiff does not need to amend until the motion to dismiss is finally resolved. Indeed, submission of an amended complaint would derail the pending dismissal motion aimed at the prior complaint because the only operative pleading at that point would be the amended one. *See Hill v. City of Indianapolis*, 17 F.3d 1016 (7th Cir. 1994) (appeals court lacked jurisdiction over appeal from dismissal of original complaint where plaintiff filed amended pleading before resolution of motion to dismiss).

In denying petitioners leave to amend at least once, and in applying concepts such as "prejudice" and "futility" to the determination of petitioners' request, the lower courts violated the Federal Rules and followed principles directly in conflict with other circuits. The Second Circuit, in *Dwares v. The City of New York*, 985 F.2d 94 (2d Cir. 1993), found that a plaintiff's absolute right to amend under Rule 15(a) does not survive a final order dismissing the original complaint under Rule 12(b)(6). *Dwares* is in direct conflict with Ninth Circuit decisions holding that, "[n]either the filing nor granting of . . . a motion [to dismiss] before answer terminates the right to amend; an order of dismissal denying leave to amend at that stage is improper." *United States ex rel. Richard Saaf v. Lehman Brothers, et al.*, 123 F.3d 1307, 1308 (9th Cir. 1997)

(citing *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995)).

Rule 15(a) means what it says. *Cf. Leatherman*, 507 U.S. at 168 (finding that Rule 8(a) "meant what it said" and that a different result "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation"). A plaintiff has an absolute right to amend his pleading at least once before a responsive pleading is filed. A motion to dismiss is not a responsive pleading. *Saaf*, 123 F.3d at 1308. A final decision granting that motion does not expunge a plaintiff's statutorily conferred right to amend. By its terms, Rule 15(a) does not require "leave" to amend granted by the district court until after the failure of the first amended pleading. Only then do such considerations as prejudice and futility come into play. Petitioners' request should have been granted *nunc pro tunc*.

This Court's intervention is necessary to resolve a conflict between the Circuits and to clarify a procedural question of great import to all federal civil actions.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that this petition be granted.

Respectfully submitted,

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Counsel of Record

APPENDIX A

SDNY/NYNY
96-cv-7798
Wood

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 16 day of November, one thousand nine hundred and ninety-eight.

PRESENT:

Honorable Ellsworth A. Van Graafeiland,
Honorable Pierre N. Leval,

Circuit Judges,

Honorable Ellen B. Burns

*District Judge.**

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*The Honorable Ellen B. Burns, Senior United States District Judge for the District of Connecticut, sitting by designation.

Edward M. Stephens, M.D., José A. Yaryura-Tobias, M.D., Judith Green, PhD., Agnes Wohl, C.S.W., and The On-Step Institute for Mental Health Research, Inc., individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

Laurie A. Baum, C.S.W., 98-7750

Plaintiff,

v.

CMG Health, FHC Options, Inc., Foundation Health PsychCare Services, Inc., Green Spring Services, Inc., Human Affairs International, Inc., Merit Behavioral Care Corp., MCC Behavioral Care Inc., United Behavioral Systems, Inc., and Value Behavioral Health, Inc.,

Defendants-Appellees.

APPEARING FOR APPELLANTS: Joseph R. Sahid, New York, NY.

APPEARING FOR APPELLEES: Kevin D. McDonald, Jones, Day, Reavis & Pogue, Washington, DC.

Appeal from the United States District Court for the Southern District of New York (Kimba M. Wood, *Judge*).

(Filed Nov. 16, 1998)

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the order of the District Court be and it hereby is **AFFIRMED**.

Plaintiffs, a putative class of individual and institutional providers of mental health care services, appeal from an order of the district court granting defendants' 12(b)(6) motion and dismissing the complaint with prejudice. Plaintiffs maintain that the court below, by inappropriately applying a heightened pleading standard, erroneously concluded that their complaint contains deficient factual allegations of a price-fixing conspiracy and of antitrust injury. They further contend that the court abused its discretion in dismissing the suit with prejudice and denying them leave to file an amended complaint.

Having considered plaintiffs' arguments, we are satisfied that the district court did not hold plaintiffs to a heightened pleading standard, but rather correctly applied Fed. R. Civ. P. 8(a), 12(b)(6), and associated caselaw. We find no error in the court's decision to dismiss plaintiff's complaint because, as we have said before, "a bare bones statement of conspiracy or of injury under the antitrust laws without any supporting facts permits dismissal." *Heart Disease Research Foundation v. General Motors Corp.*, 463 F.2d 98, 100 (2d Cir. 1972).

We also conclude that the district court did not abuse its discretion in denying plaintiffs leave to amend their complaint. Although questioned extensively by the district judge as to what amendments would be made to an amended pleading, plaintiffs' counsel failed to supply any satisfactory proposal that would cure the deficiency. The district court was within its discretion in finding that

granting permission to amend would be both futile and prejudicial.

We therefore **AFFIRM**.

FOR THE COURT:
CAROLYN CLARK CAMPBELL,
CLERK

/s/ Lucille Carr
By: Lucille Carr, Deputy
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDWARD M. STEPHENS, M.D., *et al.*,

Plaintiffs,

-against-

CMG HEALTH, *et al.*,

Defendants.

ORDER
96 Civ. 7798 (KMW)

WOOD, U.S.D.J.

For the reasons stated on the record in a conference before me on April 30, 1998, I adopted the Report and Recommendation of Magistrate Judge Naomi R. Buchwald dated July 21, 1997 (the "Report"), and dismissed the complaint in its entirety with prejudice. I found that permitting plaintiffs to amend their complaint would be futile and wasteful of both the litigants' and the Court's resources. Accordingly, I denied plaintiffs' request for leave to amend their complaint.

I note that "[w]here the possibility exists that the defect can be cured and there is no prejudice to the defendant, leave to amend at least once should normally be granted as a matter of course." *Oliver Schools, Inc. v. Foley*, 930 F.2d 248, 253 (2d Cir. 1991). My reasons for finding that the defects in plaintiffs' complaint could not be cured are stated on the record. In this Order, I supplement my finding regarding the prejudice that would be

suffered by defendants if plaintiffs are allowed to amend their complaint.

On January 19, 1997, defendants moved to dismiss the complaint for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. On March 11, 1997, plaintiffs filed their opposition to the motion to dismiss, to which defendants' reply was filed on April 1, 1997. On July 22, 1997, Magistrate Judge Buchwald issued her Report in which she recommended that the complaint be dismissed with prejudice in its entirety, and that plaintiffs' request for leave to amend their complaint be denied. Magistrate Judge Buchwald specifically noted plaintiffs had not provided a proposed amendment, nor indicated the factual allegations that they would include in an amended complaint. (Report at 31.) Magistrate Judge Buchwald also specifically recommended that plaintiffs not be permitted to amend their complaint because any amendment would be futile.

On August, 5, 1997, plaintiffs filed objections to the Report to which defendants responded on August 19, 1997. Plaintiffs' objections also did not include a proposed amended complaint. Thus, in both plaintiffs' submissions to Magistrate Judge Buchwald and to this Court, plaintiffs failed specify [sic] their proposed amendments to the complaint. As a result, defendants' resources were devoted to their challenge to the complaint, not to any of plaintiffs' possible amendments to the complaint. In these circumstances, the Court finds that defendants would be forced to expend unnecessary resources challenging the complaint, and would thereby be prejudiced, if the Court were to allow plaintiffs to amend their complaint. For this

reason and for the reasons stated on the record and in the Report, I deny plaintiffs' request for leave to replead.

The Clerk of the Court is hereby directed to close this case. Any pending motions are hereby moot.

SO ORDERED.

Dated: New York, New York
May 11, 1998

/s/ Kimba M. Wood
Kimba M. Wood
United States District Judge

Copies of this Order have been mailed to counsel for the parties.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDWARD M. STEPHENS, M.D., et al., Plaintiffs, - against - CMG HEALTH, et al., Defendants.	**REPORT AND RECOMMENDATION** 96 Civ. 7798 (KMW)

TO THE HONORABLE KIMBA M. WOOD:

This case was referred to me for general pre-trial supervision and to report and recommend on dispositive motions. This Report and Recommendation is addressed to defendants' motion to dismiss plaintiffs' complaint pursuant to Fed. R. Civ. P. 12(b)(6). I respectfully recommend that defendants' motion be granted.

BACKGROUND

This is an antitrust action brought by a putative class of plaintiffs, comprised of individual and institutional providers of mental health care services, against nine managed mental health care organizations ("MMHOs") located across the United States. The eight named plaintiffs include psychiatrists, psychologists, and clinical social workers who practice mainly in the New York area and are not participants in any of the defendant MMHOs. They purport to represent a national class of mental

health care providers, numbering in the tens of thousands, who have directly attempted to sell their services to the defendants or their alleged unspecified co-conspirators. Plaintiffs bring this action pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26,[1] contending that certain of defendants' practices violate Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 ("Section 1").[2] Plaintiffs seek treble damages and injunctive relief.

It is useful at the outset to explain the nature of defendants' business. MMHOs treat patients who receive their health care through certain managed care organizations ("MCOs") in the following fashion: many MCOs "carve out" mental health care matters and contract with MMHOs, which have special expertise in treating such problems, to administer mental health care to the MCO subscribers who require it. MCOs frequently pay MMHOs for this service on a "capitated" basis; that is, they pay a flat fee based on the number of patients "covered by" the

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[1] Section 4 of the Clayton Act states, in relevant part, "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 16 states, in relevant part, that "[a]ny person . . . shall be entitled to sue for and have injunctive relief, . . . against threatened loss or damage by a violation of the antitrust laws."

[2] Section 1 states, in relevant part, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is hereby declared to be illegal."

MCO. (Compl. ¶ 37.)[3] In turn, the MMHOs pay for the mental health care they authorize for these subscribers.[4] Actual mental health care services are rendered by providers who contract with the MMHO. These providers are limited to certain rates of reimbursement and must comply with terms and regulations established by the MMHO.

Plaintiffs allege that defendant MMHOs, which are under contract with MCOs that administer health care to approximately eighty million Americans, have unlawfully

> entered into and engaged in a continuing nationwide contract, combination and/or conspiracy . . . to fix, lower, maintain and stabilize the professional fees that could be earned by plaintiffs and the class members, and to exclude from competition by boycotts, coercion and intimidation, any class member who attempted to thwart the goal of the contract, combination and/or conspiracy.

(Compl. ¶ 41.) Plaintiffs claim that the effects of this conspiracy are threefold: first, the fees plaintiffs are able to charge patients have been fixed at artificially low and "noncompetitive" levels throughout the United States; second, overall price competition in the sale of mental health services to defendants and their co-conspirators

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[3] It is somewhat unclear from the complaint whether MMHOs are paid based on the number of participants in the MCO as a whole, or on the number of participants within the MCO who utilize MMHO services.

[4] Thus, the effect of capitation is that the lesser the amount of treatment authorized, the greater the short-term profits of the MMHO.

has been "restrained, suppressed and eliminated" nationally; and third, plaintiffs "have been deprived of the benefit of free and open competition" in sales of their services to the defendants and their co-conspirators. (Compl. ¶ 44.) Plaintiffs also allege that defendants are hurting MCO enrollees by denying them access to necessary mental health care services. (Compl. ¶ 1.)

Defendants have moved to dismiss this lawsuit pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. They argue that plaintiffs have failed to provide any facts supporting the existence of a conspiracy and that plaintiffs have failed to allege antitrust injury, a necessary element of a claim brought by a private plaintiff under the Clayton Act. Plaintiffs reply that the complaint is factually specific enough to provide defendants with notice of their claim; and that the antitrust injury alleged is "consumer welfare loss[ ]" due to an artificial reduction in the quantity or quality of available services, which necessarily results from the presence of a conspiracy between large buyers of a product.

DISCUSSION

I. Legal Standard for a Motion to Dismiss

A motion to dismiss a complaint for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. The court must accept all the allegations contained in the complaint as true, and draw all reasonable inferences in favor of the non-movant. *Still v. DeBuono*, 101 F.3d 888, 891 (2d Cir. 1996), *citing Allen v. WestPoint-Pepperell, Inc.*, 945 F.2d 40, 44 (2d Cir. 1991). Dismissal is proper only where "it appears beyond doubt

that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id., citing Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). However, "[w]hile the pleading standard is a liberal one, bald assertions and conclusions of law will not suffice." *Leeds v. Meltz*, 85 F.3d 51, 53 (2d Cir. 1996).

It is clear that this standard applies to antitrust cases, and that antitrust plaintiffs are not required to plead with any additional specificity beyond that required by Fed. R. Civ. P. 8(a).[5] *George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp.*, 554 F.2d 551, 553-554 (2d Cir. 1977), *citing Nagler v. Admiral Corp.*, 248 F.2d 319, 322 (2d Cir. 1957). In fact, "in antitrust cases, where proof is often in the control of the alleged conspirators, *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962), 'dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.' " *Three Crown Ltd. Partnership v. Caxton Corp.*, 817 F. Supp. 1033, 1047 (S.D.N.Y. 1993), *quoting Hospital Bldg. Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 746 (1976). However, "a bare bones statement of conspiracy or of injury under the antitrust laws without any supporting facts permits dismissal." *Heart Disease Research Foundation v. General Motors Corp.*, 463 F.2d 98, 100 (2d Cir. 1972).

In order to state a claim under Section 1, plaintiffs must allege (1) that two or more entities entered into a "contract, combination . . . or conspiracy," and (2) that the

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[5] Rule 8(a) provides, in relevant part, "A pleading which sets forth a claim for relief, . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief. . . . "

conspiracy was "in restraint of trade or commerce among the several States." 15 U.S.C. Section 1; *Oreck Corp. v. Whirlpool Corp.*, 639 F.2d 75, 78 (2d Cir. 1980), *cert. denied*, 454 U.S. 1083 (1981). In deciding whether plaintiffs have met this standard, we first examine Paragraph 42 of the complaint, because it is the only portion of the complaint which endeavors to detail which of defendants' activities the plaintiffs allege amount to a violation of Section 1. We will analyze each subsection of this paragraph to determine whether the allegations contained therein are violative of Section 1, recognizing that even if each piece does not by itself state a claim, all of the elements taken together may do so. *See In re Nasdaq Market-Makers Antitrust Litigation*, 894 F. Supp. 703, 712 (S.D.N.Y. 1995) (analyzing allegations of Section 1 complaint "as a whole" on motion to dismiss). We will consider this last proposition after we have completed the item-by-item analysis.

II. The Individual Antitrust Allegations

A. Defendants Acting Jointly to Fix and Lower Professional Fees and Refrain from Price Competition

Paragraph 42(a) asserts that defendants

> acted jointly and in concert to fix, lower, maintain and stabilize the professional fees that could be earned by members of the class.

Paragraph 42(c) alleges that defendants

> refrained from price competition with one another on competing for professional services for mental health care provided by the class.

We will treat these two allegations together, as they allege essentially the same thing: that defendants conspired[6] to fix prices for mental health care services.[7]

"To survive a motion to dismiss, a complaint alleging a conspiracy in violation of the Sherman Act must 'identify the relevant product market . . . co-conspirators, and describe the nature and effects of the alleged conspiracy.' " *In re Nasdaq Market-Makers Antitrust Litigation*, 894 F. Supp. at 710, *quoting Int'l Television Prods. Ltd. v. Twentieth Century-Fox Television Div. of Twentieth Century-Fox Film Corp.*, 622 F. Supp. 1532, 1537 (S.D.N.Y. 1985). A price fixing conspiracy among competitors, if proven, would be considered a per se illegal restraint of trade under Section 1. *See* Dept. of Justice and Fed. Trade Commission, "Statements of Antitrust Enforcement Policy in Health Care," 1996 WL 495164, at *45 (August 1996) (hereinafter "Antitrust Enforcement Policy"). *See also Capital Imaging Associates, P.C. v. Mohawk Valley Medical Associates*, 996 F.2d 537, 542 (2d Cir.) (stating that although few restraints of trade

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[6] Although plaintiffs generally refer to a "contract, combination or conspiracy," they nowhere plead the existence of a contract or combination; but instead refer throughout the complaint to "the conspiracy" and "defendants [and/or] their co-conspirators." (Compl. ¶¶ 21-23, 30-32, 40-41, 44(b) and (c), 45.)

[7] We also observe at the outset that all of plaintiffs' allegations are based on information and belief. Although in the antitrust context such allegations are acceptable, *see Electronic Communications Corp. v. Toshiba America Consumer Products, Inc.*, No. 96 Civ. 1565, 1996 WL 455011, at *3 (S.D.N.Y. Aug. 13, 1996), we pause to note plaintiffs' odd placement of this assertion, namely, at the end of the paragraph entitled "Jurisdiction."

are subject to the per se rule rather than the more particularized rule of reason, horizontal price-fixing is presumptively considered illegal per se because it is "so plainly harmful to competition and so obviously lacking in any redeeming pro-competitive values . . . "), *cert. denied*, 510 U.S. 947 (1993).[8]

1. Relevant Product Market

Although plaintiffs do not specifically label the relevant product market in which they claim competition is being harmed, based on other allegations it would seem that the product market plaintiffs implicate is a national market for mental health services.[9] For example, in the portion of the complaint alleging effects on interstate trade and commerce, plaintiffs allege that defendants "transacted business in professional services for mental health care . . . to clients and providers located in states throughout the United States." (Compl. ¶ 31.) Similarly, as we mentioned above, plaintiffs allege harm to price competition with respect to these services "throughout the United States." (Compl. ¶ 44(a) and (b).)

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[8] Horizontal agreements restrain competition among competitors at the same level of distribution, such as the defendants here. *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 730 (1988). Vertical agreements are those forged between entities at different levels of distribution, such as an agreement between a manufacturer and a distributor. *Id.*

[9] We note that plaintiffs do not allege territorial allocation of this national market.

We reject the proposition that such a national market exists. For purposes of Section 1, a relevant product market is defined as all products that are "reasonably interchangeable" in use for consumers. *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956). Although generally it "is a matter for proof, not pleading," *Daniel v. American Bd. of Emergency Medicine*, 802 F. Supp. 912, 926 (W.D.N.Y. 1992), whether the market alleged in the complaint is the proper one to evaluate a Section 1 claim, in this case plaintiffs base their entire case on the proposition that a national market for mental health practitioners exists: in defining the class as all those providers who have attempted to offer their services to any of the geographically diverse defendants, and in alleging that prices nationwide have been fixed and lowered by defendants, plaintiffs necessarily allege that mental health services and providers are reasonably interchangeable across the United States.

This is not the case. Psychiatrists, psychologists and social workers are not fungible; that is, a psychiatrist in one state is not eligible to practice in another because each state has its own licensing requirements for practitioners working within its borders.[10] Even if the MMHOs

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[10] For example, the named plaintiffs are based in New York, which requires states licensing for physicians, psychologists, and social workers. *See* N.Y. Educ. Law §§ 6524, 7603, 7704 (listing requirements for professional licenses in these professions). The states where defendant MMHOs are located each have similar requirements. *See, e.g.*, the requirements in Maryland, where defendants CMG Health and Green Springs Health Services, Inc. are based, Md. Code Ann. Health Occ. §§ 14-301, 18-301, 19-301 (requiring state licenses for physicians,

have contracted with MCOs that have nationwide scope, the relevant market in which professionals may actually serve patients remains the applicable licensing jurisdiction. Therefore, markets for health services are local, not national. *See Daniel*, 802 F. Supp. at 926 ("An antitrust complaint may be dismissed where the market alleged is too vague and too broad . . . "). *Cf. Electronics Communications Corp. v. Toshiba America Consumer Products, Inc.*, No. 96 Civ. 1565, 1996 WL 455011 at *4 (S.D.N.Y. Aug. 13, 1996) (refusing to dismiss complaint alleging national market for "cellular telephone equipment and accessories").

2. Nature and Effects of the Alleged Conspiracy

Although plaintiffs have named nine of the alleged co-conspirators, their allegations regarding the nature and effects of the alleged conspiracy are inadequate. Even

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psychologists and social workers); Virginia, where defendants FHC Options and Value Behavioral Health, Inc. are based, Va. Code Ann. §§ 54.1-2929, 54.1-3606, 54.1-3706 (requiring state licenses for physicians, psychologists and social workers); and Minnesota, where defendants MCC Behavioral Care Inc. and United Behavioral Systems, Inc. are located, Minn. Stat. §§ 147.02, 148.907, 148B.21 (covering licensing of physicians, psychologists and social workers).

Indeed, state law may also provide for the licensing and geographic restriction of MMHOs themselves. *See, e.g.*, N.Y. Pub. Health Law § 4403-d (providing for certification and other requirements applicable to "mental health special needs plans").

at the pleading stage, plaintiffs bear the burden of providing enough facts for the court to feel confident in "allowing a potentially massive factual controversy to proceed." *Gross v. New Balance Athletic Shoe, Inc.*, 955 F. Supp. 242, 244 (S.D.N.Y. 1997), *quoting Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983). "[C]onclusory allegations which merely recite the litany of antitrust will not suffice," *Continental Orthopedic Appliances, Inc. v. Health Ins. Plan of Greater New York*, 956 F. Supp. 367, 373 (E.D.N.Y. 1997), and "[u]nsupported . . . allegations of concerted action are prone to summary dismissal." William E. Kovacic, "The Identification and Proof of Horizontal Agreements Under the Antitrust Laws," 38 *Antitrust Bull.* 5, 26 (1993).

Plaintiffs provide virtually no factual information concerning how this alleged conspiracy operates. The only specifics provided are that defendants "join[ed] together to agree on a common course of action seeking to perpetuate and maintain the system that had been created," (Compl. ¶ 39), that defendants "met together on numerous occasions" to communicate information regarding fees and other terms, (Compl. ¶ 42(d)), (see Section I.C. below), and that defendants insured the reaching of and adherence to "agreements" through membership in and activities related to professional associations, (Compl. ¶ 42(e)), (see Section I.C. below).

" '[I]n a pleading of conspiracy it is important that . . . the opposing party be informed of the nature of the conspiracy charge, to which he may adequately plead. It is not enough merely to state that a conspiracy has taken place. Where possible, there should be some details of

time and place. . . . ' " *In re Nasdaq Market-Makers Antitrust Litigation*, 894 F. Supp. at 711, *quoting* 2A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 8.17[5] (1986) (footnotes omitted). The bare allegations set forth above plead little more than an opportunity to engage in unlawful conduct. Plaintiffs have provided no details of specific meetings, the identities of responsible individuals, the terms of the alleged "agreements," or any specific acts defendants took in furtherance of the conspiracy.[11] Thus,

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[11] The inadequacy of plaintiffs' complaint becomes even clearer when it is compared with the pleadings in other cases that have withstood similar motions to dismiss. *See, e.g., Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055, 1058-59 (2d Cir. 1996) (reversing district court's dismissal of complaint with respect to Sherman Act Section 1 claim where plaintiffs alleged the existence of various meetings between official representatives of the co-conspirators during which scheme was crafted to purchase services at inflated prices, pass the cost on to rate-paying customers, receive a secret year-end "rebate," and discriminate against plaintiff), *petition for cert. filed*, 65 U.S.L.W. 3767 (U.S. May 5, 1997) (No. 96-1785); *Ancar v. Sara Plasma, Inc.*, 964 F.2d 465, 468-69 (5th Cir. 1992) (reversing district court's dismissal of *pro se* plaintiff's allegation of conspiracy between buyers of blood plasma where plaintiff had provided "examples of the standardized price range scale and the standard consent form language"); *George C. Frey Ready-Mixed Concrete, Inc.*, 554 F.2d at 553 (reversing district court's dismissal of suit or grant of summary judgment where complaint had alleged that defendant bought plaintiffs' source of raw materials and subsequently forced plaintiffs out of business with a cost-price squeeze); *AD/SAT, A Div. of Skylight, Inc. v. Associated Press*, 885 F. Supp. 511, 515-16 (S.D.N.Y. 1995) (finding that complaint adequately stated Section 1 claim where plaintiff alleged an "invitiation to conspire" by one defendant and acceptance of that invitation by other defendants, as evidenced by the latters' canceling contracts with plaintiff, announcing cancellations of

plaintiffs' complaint is similar to the one in *Heart Disease Research Foundation*, 463 F.2d at 99, which stated only that "defendants [automobile manufacturers] have committed antitrust violations by conspiring to suppress the development of motor vehicle pollution control devices." In that case, the district court dismissed the complaint for failure to state a claim, and the Second Circuit affirmed, stating that "it was well within the district court's discretion to dismiss the claim since no facts are alleged supporting an antitrust conspiracy." *Id.* at 100.

Another approach plaintiffs could have utilized to allege conspiracy would have been to cite examples of "conscious parallelism,"[12] a lawful practice which may

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such contracts, refusing to consider proposals from plaintiff, and refusing to pay plaintiff); *Three Crown Ltd. Partnership*, 817 F. Supp. at 1047-48 (complaint upheld where plaintiff alleged specifics of meeting and details of alleged "squeezing" of certain financial markets in order to artificially inflate prices). *See also In re Nasdaq Market-Makers Antitrust Litigation*, 894 F. Supp. 703 (complaint dismissed with leave to replead to add the names of specific stocks where conspiracy was otherwise adequately alleged, when plaintiffs included specifics regarding conspiracy to eliminate "odd eighths" from the stock spread and specifics of coercion tactics used to enforce the agreement).

[12] The phrase "conscious parallelism" describes conduct by rivals in an industry who "coordinate their conduct simply by observing and reacting to the moves of their competitors." Kovacic, "The Identification and Proof of Horizontal Agreement Under the Antitrust Laws," at 31. The effect of such conscious action, such as parallel pricing, is not considered illegal in the absence of "additional facts and circumstances . . . to show that the decisions were interdependent and thus raise the inference of a tacit agreement. . . . " *Id.* at 33 n. 91, *quoting Modern Home Institute, Inc. v. Hartford Accident & Indemnity Co.*, 513 F.2d 102 (2d Cir. 1975).

nevertheless lead to an inference of illegal conspiracy. *See In re Nasdaq Market-Makers Antitrust Litigation*, 894 F. Supp. at 713-14. In some instances, where defendants have engaged in parallel pricing or other parallel behavior, but no actual collusion can be demonstrated, a court will examine "plus factors" to determine whether it can be inferred that the defendants were acting pursuant to a tacit agreement to act collectively.[13]

However, plaintiffs have failed even to allege conscious parallelism. The complaint contains nothing more than generalized, conclusory allegations that defendants "fixed, lowered, maintained and stabilized" fees. (Compl. ¶ 44(a).)[14] We are not supplied with any details regarding actual fees paid by any of the individual defendants, let alone any comparison of fee structures between them.

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[13] Examples of "plus factors" include the existence of a rational motive for defendants to behave collectively, actions taken contrary to a defendant's self-interest unless pursued as part of a collective plan, market phenomena that cannot be explained rationally except as the product of concerted action, and a defendant's record of past collusion-related antitrust violations. Kovacic at 31-55.

[14] Plaintiffs also allege that defendants agreed to employ similar practices in their administration of mental health care, such as the receipt of capitated payments and the improper use of short-term mental health care therapy. (Compl. ¶¶ 42(b)(i) and (ii).) However, as we find below, similar methods of cutting costs are utilized by managed health care providers in all fields and do not raise antitrust issues. *See, e.g.*, Milt Freudenheim, "Pioneeering State For Managed Care Considers Change," *The New York Times*, July 14, 1997, at A1 (describing the legislative backlash in California against numerous cost-cutting methods employed by HMOs). Therefore, we do not consider them examples of conscious parallelism.

Nor are there any allegations that any of the defendants changed their practices or fee scales to conform with one another after the initiation of the agreement. Additionally, there are no allegations that letters were sent to network providers indicating a change in reimbursement rates or methods of practice. In short, there are no concrete assertions that any defendant is acting similarly to any other. *Cf. In re Brand Name Prescription Drugs Antitrust Litigation*, Nos. 94C896, MDL 997, 1994 WL 240537, at *3 (N.D. Ill. May 27, 1994) (denying defendants' motion to dismiss where complaint provided specific examples of prescription drug prices charged to plaintiffs as compared with prices charged to other pharmacies, described signed contract agreements and parallel pricing, and contained specific allegations regarding market conditions that suggested prices charged to plaintiffs would not have risen so dramatically absent collusion among defendants).

In sum, we find that these portions of the complaint do not adequately allege the "concerted action" necessary to sustain a Section 1 claim.

B. Defendants Acting Jointly to Enforce Policies Which Excluded Members of the Class From Competition

Plaintiffs next allege that defendants

> acted jointly and in concert to enforce policies which tended to and did exclude the members of the class from competition. . . .

(Compl. ¶ 42(b).) Although it is unclear, we construe this allegation to mean that defendants refused to deal with

the plaintiff providers, who would not agree to abide by defendants' policies (the alleged "boycott").[15] In the alternative, the complaint could be read to mean that these practices enable defendants to keep prices low, thereby excluding plaintiffs from competition because they cannot afford to match or better defendants' prices.

In either case, defendants' internal policies do not implicate antitrust concerns. Managed care organizations are free to contract only with those providers who accept their contractual terms; in this respect they are no different from any other entity that employs workers or utilizes independent contractors.[16] None of the practices complained

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[15] As we mentioned above, plaintiffs describe themselves as a class of providers who have "directly attempted to have their professional services . . . utilized . . . by any of the defendants or their co-conspirators. . . ." (Compl. ¶ 23.) Without further clarification and in light of the rest of the complaint, we assume that plaintiffs did not become members of defendants' networks because they refused to accept defendants' rates of reimbursement and/or terms of employment.

[16] In fact, it is presently lawful under federal law for managed care networks to exclude even those doctors willing to comply with their terms, as long as those providers are able to compete effectively outside the network. *See Levine v. Central Florida Medical Affiliates, Inc.*, 72 F.3d 1538, 1551 (11th Cir.) (following Dept. of Justice and Fed. Trade Commission's *Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust* (1994) at 42), *cert. denied*, 117 S. Ct. 75 (1996). However, "any-willing-provider" laws, which require networks to include all health care providers who agree to abide by the network's terms, are in effect in some states. *See* Constantine G. Papavizas and Norman F. Lent III, "HMO Legislation is Aimed at Protecting Patients – Consumers and Providers Call for Regulation; the Managed Care Industry Would Disagree," *Nat'l Law Journal*, April 7, 1997, at B8.

of affect plaintiffs directly, since they do not belong to the MMHOs and are not subject to these policies. Plaintiffs' economic complaint boils down to distress that the defendants reimburse their membership at lower rates than plaintiffs were accustomed to charging or would like to charge. This is a by-product of the network system, which currently is a lawful form of organization. Whether managed care in one form or another is ultimately a wise method to provide health care is a legislative, not a judicial, issue.

Plaintiffs also attack certain specific policies that they assert defendants follow. Their first claim is that defendants are

> putting themselves in inherent conflict of interest situations by accepting capitated or other forms of risk-shifting payments.

(Compl. ¶ 42(b)(i).) However, it is clear that capitation is currently lawful. *See Capital Imaging Associates, P.C. v. Mohawk Valley Medical Associates*, 996 F.2d 537, 539 (2d Cir.) ("the capitation system promotes efficiency and is viewed as pro-competitive because it gives . . . physicians an incentive to keep medical costs down"), *cert. denied*, 510 U.S. 947 (1993). Nevertheless, we recognize that the system is currently under scrutiny. Specifically, capitation and other risk-shifting compensation systems are being criticized for resulting in the withholding of care and denial of referrals,[17] and Congress is currently considering legislation to eliminate or restrict these incentives and

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[17] Capitation "has been described as a form of bribery." Charles Stein, "Money and Medicine – How the Profit Motive in Health Care May Turn Out to be Good for Your Health," *The*

to require their disclosure in Medicare and private plans. Papavizas and Lent at B8.

Second, plaintiffs criticize defendants for

> insisting on cost-cutting methods that were not justified under the circumstances, including the inappropriate use of: short-term mental health care therapy; medication to minimize mental health care therapy; and inexpensive classes of mental health care providers.

(Compl. ¶ 42(b)(ii).) Clearly these broad issues concerning medical efficacy are outside the province of courts presented with a claimed violation of the antitrust laws.

Third, plaintiffs complain that defendants are

> intruding into confidential matters and imposing "gag" (or "nondisparagement") orders to facilitate their cost-cutting measures.

(Compl. ¶ 42(b)(iii).) Gag and nondisparagement orders, which prevent doctors from telling their patients about certain treatments and services and from disparaging the MCO, are again a matter for legislative resolution, as evidenced by the fact that the House of Representatives' Commerce Committee recently approved a bill that would prevent HMOs from enforcing any gag orders, Robert Pear, "House Bill Backs Safeguards on HMO's,"

Boston Globe, June 1, 1997, at 14. Physicians practicing in many areas of health care are finding fault with capitation and other financial incentive systems used by managed care organizations, and some are mobilizing to protest what they call "the transform[ation of] healing from a covenant into a business contract." Peter T. Kilborn, "Doctors Organize to Fight Corporate Intrusion," *The New York Times*, July 1, 1997, at A12.

The New York Times, June 13, 1997, at A22, and by the fact that numerous states have just passed legislation dealing with this issue, *see* "States Adopt Managed Health Care Legislation Establishing Network Standards, Consumer Protections," 66 *U.S.L.W.* at 2017, 2026-2028 (July 8, 1997).[18]

Next, plaintiffs contend that defendants are

> refusing to share their criteria or the names of the network participants; [and] refusing to disclose (or affirmatively misrepresenting) their policies.

(Compl. ¶ 42(b)(iv) and (v).) This allegation is unclear as to whom defendants are refusing to disclose this information. If it is to patients, *see generally* Sandra G. Boodman, "Managed Care Comes to Mental Health; Are Patients Getting What They Need?" *The Washington Post*, May 6, 1997, plaintiffs, suing only on their own behalf, have no standing to bring this claim. If the refusal is to prospective providers, it does not make sense that an MMHO

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[18] To the extent plaintiffs complain of defendants' "intruding into confidential matters" separately from the issue of gag and nondisparagement orders, this too is a legislative matter. *See, e.g.*, Alex Pham, "HMOs: Managing Managed Care – Faced With Growing Constituent Complaints, Lawmakers Are Poised to File a Flurry of New Health Care Legislation," *The Boston Globe*, March 30, 1997, at F1 (describing proposed Massachusetts mental health bill that would "prohibit plans from requesting patient information beyond their name, diagnosis, and date and type of care requested," meant to respond to complaints of HMOs asking for "excruciating amounts of detail" about mental health history before deciding whether to pay for treatment).

would refuse to share its criteria or policies with a prospective member. If the MMHO refuses to reveal its membership list, nothing prevents the prospective provider from calling other providers and inquiring about whether they have joined. Again, plaintiffs have failed to make the connection between these complaints and the antitrust laws.

Lastly, plaintiffs contend that defendants are

> excluding or terminating providers who did not accept their policies.

(Compl. ¶ 42(b)(vi).) As we mentioned above, there is nothing unlawful about terminating an employee or independent contractor who refuses to accept conditions of employment or contractual terms. A network survives by including as members only those who will agree to cost-containment measures.

In sum, whether plaintiffs' criticisms of defendants' policies are well-justified raises issues that the legislature must decide.[19] For purposes of this lawsuit, the

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[19] We recognize the general view that "managed care so far has not demonstrated that it can handle mental health as competently as it handles physical ailments." Stein at 14; *accord* Sandra G. Boodman, "Managed Care Comes to Mental Health; Are Patients Getting What They Need?" *The Washington Post*, May 6, 1997. Of recent note is the federal Mental Health Parity Act of 1996, which beginning in 1998 will forbid companies that employ fifty or more workers to establish different coverage limits for mental and physical illness, unless it would have a huge impact on premiums. *See* Elizabeth Neus, "Poll: Mental, Physical Illnesses Should Get Same Level of Health Insurance," *Gannett News Service*, June 5, 1997.

challenged practices are legal and do not implicate the antitrust laws.

C. Defendants Meeting to Communicate About Fees and Terms and Acting through Trade Associations

Finally, plaintiffs allege that defendants

> (d) met together on numerous occasions and have, thus, had the opportunity to communicate with one another about fees and other terms of engagement of the members of the class and have, in fact, done so, and
>
> (e) acted jointly and in concert, through the American Managed Behavioral Healthcare Association, the National Committee for Quality Assurance, and otherwise, at meetings and through mailings and publications, telephone and other forms of communication, to insure that the defendants and their co-conspirators would reach the agreements described in this paragraph and not deviate from those agreements.

(Compl. ¶ 42(d) and (e).) If an exchange of price information between competitors actually results in an agreement among them regarding prices for health care services, that agreement would be considered unlawful per se. Antitrust Enforcement Policy at *21. However, no conspiracy or agreement regarding prices has been sufficiently alleged. Without such allegations, attendance at meetings and the mere opportunity to conspire are insufficient to prove conspiracy. *Capital Imagining Associates, P.C.*, 996 F.2d at 545; *Venture Technology, Inc. v. National*

Fuel Gas Co., 685 F.2d 41, 45-47 (2d Cir.), *cert. denied*, 459 U.S. 1007 (1982); *Oreck Corp. v. Whirlpool Corp.*, 639 F.2d 75, 79 (2d Cir. 1980), *cert. denied*, 454 U.S. 1083 (1981).

Similarly, involvement in trade associations and discussion of price-saving methods do not automatically implicate a conspiracy, unless the association explicitly regulates an area of activity in which the members are in competition. *AD/SAT, A Div. of Skylight, Inc. v. Associated Press*, 920 F. Supp. 1287, 1308 (S.D.N.Y. 1996), *citing Consolidated Metal Prods. Inc. v. American Petroleum Inst.*, 846 F.2d 284, 293-94 (5th Cir. 1988) (finding that a trade association is not a "walking conspirac[y]"), *and Wilk v. American Medical Ass'n*, 895 F.2d 352, 374 (7th Cir.), *cert. denied*, 498 U.S. 982 (1990). There is no claim here that the organizations named above explicitly set fees or allocated the geographic market.

In the absence of a factual basis to support the claimed conspiracy, accusations that defendants met together and belonged to the same trade groups, devoid of any details concerning meetings or specific discussions or agreements, are insufficient to support a claim of an antitrust violation.

III. The Antitrust Allegations Considered as a Whole

As we stated at the beginning, even if the separate elements of plaintiffs' claim do not state a cause of action under Section 1, it is possible that they might do so when considered altogether. However, in this case they do not.

At the outset, we reject the idea that plaintiffs have been boycotted by defendants. (*See* Compl. ¶ 41.)[20] Managed care plans and indeed any employer are free to choose not to contract with workers who will not accept their compensation packages or their terms of employment. Moreover, plaintiffs apparently voluntarily opted out of belonging to defendant MMHOs for financial reasons and because of philosophical differences regarding patient care. However, a voluntary opt-out does not equal a boycott.

Therefore, we examine the allegations to determine whether they adequately state a claim for relief based upon a theory of horizontal price-fixing. As it is pled, plaintiffs' claim is inadequate for the aforementioned reasons, and for two additional reasons.

A. Plaintiffs Fail to Allege Antitrust Injury

In order to bring an antitrust action under Sections 4 and/or 16 of the Clayton Act, a plaintiff "must show more than just that he was harmed by the defendant's conduct." *Clorox Co. v. Sterling Winthrop, Inc., Reckitt & Colman, Inc.*, ___ F.3d ___, No. 96-9030, 1997 WL 349899, at *8 (2d Cir. June 26, 1997) (*quoting K.M.B. Warehouse Distributors, Inc. v. Walker Mfg. Co.*, 61 F.3d 127, 129 (2d Cir. 1995)). Specifically, a private plaintiff "must prove the existence of 'antitrust injury, which is to say injury of

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[20] Plaintiffs also contend that they have been coerced and intimidated. (Compl. ¶ 41.) However, as absolutely no facts to support this allegation have been pled, we need not address this contention.

the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.' " *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990), *quoting Brunswick v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977); *G.K.A. Beverage Corp. v. Honickman*, 55 F.3d 762, 766 (2d Cir.), *cert. denied*, 116 S. Ct. 381 (1995). That is, plaintiffs must allege injury stemming from the anticompetitive effects of defendants' behavior, because antitrust laws "were enacted for the protection of competition, not competitors." *Balaklaw v. Lovell*, 14 F.3d 793, 797 (2d Cir. 1994) (citations omitted).[21] Antitrust injury must be pled even where the behavior that plaintiffs allege constitutes a per se violation of the antitrust laws. *Sage Realty Corp. v. ISS Cleaning Services Group, Inc.*, 936 F. Supp. 130, 135 (S.D.N.Y. 1996).

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[21] Although plaintiffs complain of an agreement to decrease rather than increase prices, it is clear that both types of agreements may cause harm. Consequently, price fixing agreements that both lower and raise prices have been deemed per se illegal by the Supreme Court. *See Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 347 (1982). It is the economic nature of the harm that flows from these two situations that differs. Specifically, an agreement to fix a maximum price ceiling may result in the selection of an [sic] price that deters entry into the market; such an agreement may be an implicit arrangement to forego additional service or quality improvements; or the set maximum price may become the minimum. *See* Frank H. Easterbrook, "Maximum Price Fixing," 48 *U. Chi. L. Rev.* 886, 900-08 (1981). In addition, "[m]aximum prices may be fixed too low for the [provider] to furnish services essential to the value which goods have for the consumer. . . . " *Arizona*, 457 U.S. at 347 (*quoting Albrecht v. Herald Co.*, 390 U.S. 145, 152-53 (1968)).

The distinction between harm to an individual competitor and antitrust harm is aptly described in the aforementioned Antitrust Enforcement Policy promulgated by the Department of Justice and the Federal Trade Commission:

> The focus of the analysis is not on whether a particular provider has been harmed by the exclusion or referral policies, but rather whether the conduct reduces competition among providers in the market and thereby harms consumers. Where other networks offering the same types of services exist or could be formed, there are not likely to be significant competitive concerns associated with the exclusion of particular providers by particular networks.

Antitrust Enforcement Policy at *50 (describing rule of reason analysis in the context of the exclusion of providers or classes of providers from a particular "multi-provider network"). Plaintiffs here have failed to allege injury stemming from anticompetitive effects of defendants' activities. The only injury to parties other than themselves is mentioned only once, when plaintiffs claim that their lawsuit "seeks to stop the defendants from profiting from the misery they are causing so many people who are currently being denied access to health care services they need so desperately." (Compl. ¶ 1.) In their memorandum of law in opposition to this motion, they allege that defendants' behavior "*necessarily* leads to consumer welfare losses by artificially reducing the quantity or quality of services available to consumers." (Class Pls.'

Mem. of Law in Opp. to Defs.' Mot. to Dismiss ("Pls.' Mem.") at 10) (emphasis in original).[22]

As for a reduction in the quantity of services rendered, as we explained earlier, this is a matter of legislative and regulatory policy. Whether the MMHOs provide inadequate care to their subscribers is a result of their internal policies, and not a result of harm to the market because prices have been depressed. On the contrary, we might expect that if the MMHOs have caused prices to go down, and plaintiffs have been forced to charge lower prices, patients unsatisfied with the mental health care provided by their MMHO would go outside the network and pay plaintiffs for their services. In this respect, a network may prove to be procompetitive by enabling outsiders to compete and perhaps form their own networks if the original network's product falls below an acceptable standard. *See* Antitrust Enforcement Policy at *50.

As for a reduction in quality, to the extent that plaintiffs seem to infer that they, as providers who will not work for lower rates or conform to MMHO policy, are of higher quality than network doctors, we refuse to make this assumption. Plaintiffs have not provided any factual allegations supporting such a contention. To the extent

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[22] Plaintiffs borrow this idea from a law review article. *See* Roger D. Blair and Jeffrey L. Harrison, *Rethinking Antitrust Injury*, 42 Vand. L. Rev. 1539, 1565-69 (1989) (providing an economic analysis of the harm produced by "collusive monopsony," a market situation in which a small group of large buyers ("oligopsonists") colludes in order to fix the prices they will pay below the price that would prevail in the absence of an agreement).

that the quality of mental health care is worse because of MMHO practices and dominance in the market, this again is a difficult issue best left to the legislature for resolution.[23]

Thus, plaintiffs have not demonstrated the harm to competition and the market that the antitrust laws were designed to prevent. Besides failing to demonstrate antitrust harm to consumers, their allegation that "fees- . . . have been fixed . . . throughout the United States," (Compl. ¶ 44(a)), is wholly unsupported. Plaintiffs have failed to allege any harm other than the thwarting of their desire to charge more for their services. *Cf. Levine v. Central Florida Medical Associates*, 72 F.3d 1538, 1551 (11th Cir.) (finding no antitrust injury where doctor excluded from network nevertheless achieved financial success, reasoning that antitrust laws are designed to protect competition generally, not "to improve [plaintiff's] income standings in the physician league or help him win the Super Bowl of remuneration"), *cert. denied*, 117 S. Ct. 75 (1996).

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[23] *See* Stein at 14 (discussing the complicated nature of measuring the quality of mental health care, "where it is not easy to figure out even what to measure"). Senator Pete Domenici recently reaffirmed the need to "strive to ensure quality of [mental health] care and access to care. We must develop procedures to evaluate treatment measures used by managed care companies." "Report: Mental Health Parity Affordable – Pete Domenici," *Gov't Press Releases*, April 29, 1997.

B. Plaintiffs Fail to Allege An Unreasonable Restraint of Trade

As we stated previously, the essential elements of a Section 1 claim are "an illegal antitrust combination [and] an unreasonable restraint of trade." *Capital Imaging, Inc.*, 996 F.2d at 541. Since we have already determined that plaintiffs failed to adequately allege concerted action, *see* Section II.A., *supra*, we need not go on to consider whether a properly pled agreement would constitute an unreasonable restraint of trade. *Capital Imaging, Inc.*, 996 F.2d at 542. However, in the interest of completeness, we nonetheless analyze whether plaintiffs have alleged sufficient facts regarding this second prong of the Section 1 prima facie case.

A horizontal agreement to fix prices is automatically considered an unreasonable restraint of trade under the per se rule. However, an agreement concerning behavior that does not amount to a clear case of horizontal price-fixing would be analyzed, as are most restraints of trade, according to the "rule of reason."[24] There is a presumption in favor of this rule, *Hertz Corp. v. City of New York*, 1

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[24] Analysis under the rule of reason proceeds in three steps: "[P]laintiff bears the initial burden of showing that the challenged action has had an actual adverse effect on competition as a whole in the relevant market. If the plaintiff succeeds, the burden shifts to the defendant to establish the pro-competitive redeeming virtues of the action. Should the defendant carry this burden, the plaintiff must then show that the same pro-competitive effect could be achieved through an alternative means that is less restrictive of competition." *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 127 (2d Cir. 1995) (quotation and citations omitted).

F.3d 121, 126 (2d Cir. 1993), *cert. denied*, 501 U.S. 1111 (1994), and it is employed when a combination may have some procompetitive effects, such as the lowering of prices alleged here. *See Westchester Radiological Associates P.C. v. Empire Blue Cross and Blue Shield, Inc.*, 707 F. Supp. 708, 710-11 (S.D.N.Y.), *aff'd*, 884 F.2d 707 (2d Cir. 1989), *cert. denied*, 493 U.S. 1095 (1990).

Analysis under the rule of reason, which "focuses directly on the challenged restraint's impact on competitive conditions," *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978), requires consideration of a "variety of factors," *Hertz Corp.*, 1 F.3d at 126. One "highly relevant" consideration is defendants' market power, which "bears a particularly strong relationship to a party's ability to injure competition," *Capital Imaging, Inc.*, 996 F.2d at 546. Market power must be established where, as here, plaintiffs failed to allege actual detrimental effects on competition and instead must attempt to establish a potential for genuine adverse effects. *K.M.B. Warehouse Distributors, Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 129 (2d Cir. 1995), *citing Capital Imaging, Inc.*, 996 F.2d at 546.

"In determining whether a firm possesses market power, 'the first step in a court's analysis must be a definition of the relevant markets.' " *United States v. Eastman Kodak*, 63 F.3d 95, 104 (2d Cir. 1995), *quoting Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 268 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). The definition of a relevant market includes the product market and the geographic market. *See id.* As we decided earlier, plaintiffs' allegation that there is a single product market for professional mental health care services that spans the

entire United States is unfounded. Mental health care services are not interchangeable across the nation. Therefore, plaintiffs cannot allege that the defendants have market power in a national market.

In addition, even if there was a national market for health care services, plaintiffs have not alleged that defendants control a large enough share to possess the market power needed to adversely affect competitive conditions. Plaintiffs allege that defendants "collectively control the quality and amount of mental health care treatment of approximately 80 million Americans." (Compl. ¶ 1.) In the absence of allegations to the contrary, we read this to mean that the MCOs that contract with defendant MMHOs count eighty million Americans among their enrollees. A share of eighty million people is less than one-third of the current American population.[25] Even assuming that all of the enrollees seek mental health care through their MCOs, less than one-third of a market is not a sufficient share to enable defendants to exert a

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[25] *See* William Branigin and Pamela Constable, "Foundering in a Wave of Immigrants; U.S. Prosperity Eludes Millions of Newcomers," *The Washington Post*, May 10, 1997, at A1 (describing the current population of the United States as 265 million people, projected to grow to nearly 400 million in the next fifty years).

Even if we consider defendants' market share as a percentage of the amount of Americans who have health insurance, which is approximately 225 million people, defendants still occupy only 36% of the market. *See* Eric Pooley, "Too Good to Be True? By Almost Any Measure, Life is Swell in the U.S. What Went Right?" *Time Magazine*, May 19, 1997, at 28 (quoting former Labor Secretary Robert Reich stating that forty-four million Americans lack health insurance).

controlling influence on prices in the entire market. *See Eastman Kodak Co.*, 63 F.3d at 109 (finding that thirty-six percent control of the world market share for film is "low" and does not constitute market power).[26] Far from preventing plaintiffs from entering the market, "[t]his [market share] leaves plaintiff[s] capable of vigorously competing for the other [two-thirds] of [it]." *Retina Associates, P.A. v. Southern Baptist Hosp. of Florida, Inc.*, 105 F.3d 1376, 1383 (11th Cir. 1997).

We therefore find that plaintiffs have also failed to allege an unreasonable restraint of trade.

We note finally that the antitrust violation plaintiffs allege is counter to reason. Keeping costs down to maximize profits is independently a motivation for each MMHO. An actual conspiracy or other agreement is unnecessary in the current national climate of managed health care, in which all managed care organizations publicly declare that reducing health care costs is their raison d'être.

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[26] *See also Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 25 (1984) (holding in product-tying claim that thirty percent control of market was insufficient to warrant a finding of per se invalidity); *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 596 (1st Cir. 1993) (holding that power over twenty-five percent of relevant market was insufficient under rule of reason to justify liability for vertical exclusivity arrangement); *Ortho Diagnostic Systems, Inc. v. Abbott Laboratories, Inc.*, 926 F. Supp. 371, 374 (S.D.N.Y. 1996) (finding in claim under Section 2 of the Sherman Act that party in control of twenty-five to thirty percent of market "does not even arguably have market power").

In addition, since defendants operate in vastly distant geographical areas, it would not make sense for them to act in concert to lower their prices. MMHOs in each geographic region are competing under the business conditions of that particular region, and must make pricing decisions based on local competition. It would not make sense for an MMHO serving a large metropolitan area to coordinate its prices with an MMHO serving a rural region; similarly, a provider licensed in one region of the country will very rarely be lured to another region because of a differential in reimbursement rates.[27]

In addition, plaintiffs allege that defendants embarked upon their common plan because of a "growing threat to their way of doing business caused by dissatisfaction among providers, patients, and other members of the public. . . . " (Compl. ¶ 39.) They claim that defendants joined together to "perpetuate and maintain [this] system" in order to maintain their ability to make profits. (*Id.*) This contention defies logic. A company providing a poor product cannot ensure a continuation of its profit stream by vowing to keep its product substandard, especially when that company (or group of companies) does not monopolize or control the market. It makes no sense that defendants would seek to perpetuate a way of doing business that drives away customers.

Rather, it seems to us that plaintiffs, who cannot allege any actual facts concerning collusion, merely wish

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[27] We note that plaintiffs make no allegation that defendants have engaged in territorial allocation of the market.

to protest the buying power of managed care organizations and their collective ability to decrease prices for medical care. However, it is not an antitrust violation for large buyers to "bargain[ ] for the best deal possible." *Westchester Radiological Associates, P.C.*, 707 F. Supp. at 713 n. 13. Decreasing prices is one of the main aims of managed care, and, with the right regulatory protection, is probably a development welcomed by many. *Cf. id.* at 714 ("[T]o the extent consumer welfare is the goal of antitrust, a court should be hesitant to extend antitrust law to strike down a system that currently saves consumers [money]").

IV. Plaintiffs' Request to Amend The Complaint

Plaintiffs request permission, in the event their complaint is dismissed, to file an amended complaint. (Pls.' Mem. at 14-15.) However, they provide no proposed amendment, nor do they indicate any factual allegations they failed to include in the current complaint but would be able to provide should permission to amend be granted.

The amendment of a complaint is governed by Fed. R. Civ. P. 15(a), which provides that leave to amend "shall be freely given when justice so requires." It is within the discretion of the district court to decide whether leave to amend should be granted. *Ruffolo v. Oppenheimer & Co.*, 987 F.2d 129, 131 (2d Cir. 1993). The Supreme Court has stated that leave should be freely granted except in those cases involving undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies in the pleading,

undue prejudice to the opposing party, or "futility of the amendment." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

With respect to this last consideration, if "permitting leave to amend would serve no purpose," leave should be denied. *Jones v. Capital Cities/ABC Inc.*, 874 F. Supp. 626, 630 (S.D.N.Y. 1995). We believe that an amendment in this case would be futile. Plaintiffs have "not advised the Court of any facts which make it likely that it can plead a valid antitrust cause of action." *Electronics Communications Corp. v. Toshiba America Consumer Products*, No. 96 Civ. 1565, 1996 WL 455011, at *6 (S.D.N.Y. Aug. 13, 1996). Since plaintiffs have provided so little evidence of an actual conspiracy or defendants' ability to restrain trade, we do not see how they could amend their bare-bones complaint to sufficiently state a cause of action. *Cf. Continental Orthopedic Appliances, Inc. v. Health Ins. Plan of Greater New York*, 956 F. Supp. 367, 374 (S.D.N.Y. 1997) (dismissing allegations regarding conspiracy with leave to replead where plaintiffs had adequately alleged harm to competition); *In re Nasdag Market-Makers Antitrust Litigation*, 894 F. Supp. 703, 713 (S.D.N.Y. 1995) (dismissing complaint with leave to replead where plaintiffs adequately alleged details and nature of conspiracy but failed to include the names of specific securities affected by the conspiracy). Therefore we recommend that permission to amend be denied.

CONCLUSION

For the reasons stated above, we respectfully recommend that defendants' motion to dismiss the complaint with prejudice be granted.

Copies of this Report and Recommendation have been mailed to all parties, who are hereby instructed that any objections to the Report and Recommendation must in accordance with Fed. R. Civ. P. 72 be filed with Your Honor within 10 days from this date, unless an extension of time is granted by you. Failure to object to the report within 10 days will preclude appellate review. 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 6(a), 6(e), and 72.

Respectfully submitted,

Dated: New York, New York
July 21, 1997

/s/ Naomi Reice Buchwald
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UNITED STATES
MAGISTRATE JUDGE

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APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Edward M. Stephens, M.D., Jose A. Yaryura-Tobias, M.D., Judith Green, Ph.D., Fugen Neziroglu, Ph.D., Ona Robinson, Ph.D., Laurie A. Baum, C.S.W., Agnes Wohl, C.S.W., and The On-Step Institute for Mental Health Research, Inc., individually and on behalf of all others similarly situated, Plaintiffs, v. CMG Health, FHC Options, Inc., Foundation Health PsychCare Services, Inc., Green Spring Health Services, Inc., Human Affairs International, Inc., Merit Behavioral Care Corp., MCC Behavioral Care Inc., United Behavioral Systems, Inc., and Value Behavioral Health, Inc., Defendants.	**JURY TRIAL DEMANDED** (Received Oct. 15, 1996)

CLASS ACTION COMPLAINT

INTRODUCTION

1. This antitrust action is brought on behalf of a class of mental health care providers, consisting of individuals and professional organizations, on behalf of

themselves, their members, and all others similarly situated, who collectively have suffered billions of dollars of financial losses as a result of an unlawful conspiracy in restraint of trade engaged in by the defendants, who collectively control the quality and amount of mental health care treatment of approximately 80 million Americans. This lawsuit seeks to stop the defendants from profiting from the misery they are causing so many people who are currently being denied access to health care services they need so desperately.

JURISDICTION

2. This action is brought under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, to recover treble damages, injunctive relief, and the costs of suit, including reasonable attorneys' fees, for the injuries to the plaintiffs and members of the class they represent resulting from defendants' violations of the federal antitrust laws, specifically Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. The Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1337(a) and 15 U.S.C. §§ 15 and 26. This section below entitled "violations alleged" is based on information and belief.

VENUE

3. Venue is proper in this judicial district pursuant to 15 U.S.C. § 22 and 28 U.S.C. § 1391(b) because each of the defendants resides, transacts business, is found and/or has agents in this district, and because a substantial part of the events giving rise to plaintiffs' claims occurred, and a substantial portion of the affected interstate trade

and commerce described below has been carried out, in this district.

PLAINTIFFS

4. Plaintiff Edward M. Stephens, M.D. ("Stephens") is a psychiatrist engaged in private practice in New York City, among other places. Stephens has attempted to have his professional services utilized by one or more of the defendants named herein.

5. Plaintiff Jose A. Yaryura-Tobias, M.D. ("Yaryura-Tobias") is a psychiatrist engaged in private practice in Long Island, NY, among other places. Yaryura-Tobias has attempted to have his professional services utilized by one or more of the defendants named herein.

6. Plaintiff Judith Green, Ph.D. ("Green") is a psychologist engaged in private practice in New York City, among other places. Green has attempted to have her professional services utilized by one or more of the defendants named herein.

7. Plaintiff Fugen Neziroglu, Ph.D. ("Neziroglu") is a psychologist engaged in private practice in Long Island, NY, among other places. Neziroglu has attempted to have her professional services utilized by one or more of the defendants named herein.

8. Plaintiff Ona Robinson, Ph.D. ("Robinson") is a psychologist engaged in private practice in New York City, among other places. Robinson has attempted to have her professional services utilized by one or more of the defendants named herein.

9. Plaintiff Laurie A. Baum, C.S.W. ("Baum") is a clinical social worker engaged in private practice in New York City, among other places. Baum has attempted to have her professional services utilized by one or more of the defendants named herein.

10. Plaintiff Agnes Wohl, C.S.W. ("Wohl") is a clinical social worker engaged in private practice in Long Island, NY, among other places. Wohl has attempted to have her professional services utilized by one or more of the defendants named herein.

11. Plaintiff The On-Step Institute for Mental Health Research, Inc., ("On-Step") is a New York corporation serving as an association of providers of mental health care services. Members of On-Step have directly attempted to have their professional services utilized by one or more of the defendants named herein. On-Step's members would have standing to maintain this action in their own names. The interests asserted in this Complaint are germane to On-Step's purpose. Participation by each of On-Step's members in this action is not required. On-Step is duly authorized by its members to prosecute this action, including its claim for money damages for each member of the class on its own behalf and on behalf of its members.

DEFENDANTS

12. Defendant CMG Health ("CMG") is a Maryland corporation with its principal place of business in Owings Mills, Maryland. During the time period covered by this Complaint, CMG engaged in the business of deciding the terms and conditions under which members of the class

would be allowed to have their professional services utilized by managed mental healthcare organizations throughout substantial portions of the United States.

13. Defendant FHC Options, Inc. ("Options") is a Virginia corporation with its principal place of business in Norfolk, Virginia. During the time period covered by this Complaint, Options engaged in the business of deciding the terms and conditions under which members of the class would be allowed to have their professional services utilized by managed mental healthcare organizations throughout substantial portions of the United States.

14. Defendant Foundation Health PsychCare Services, Inc. ("Foundation") is a Delaware corporation with its principal place of business in San Rafael, California. During the time period covered by this Complaint, Foundation engaged in the business of deciding the terms and conditions under which members of the class would be allowed to have their professional services utilized by managed mental healthcare organizations throughout substantial portions of the United States.

15. Defendant Green Springs Health Services, Inc. ("Green Springs") is a Delaware corporation with its principal place of business in Columbia, Maryland. During the time period covered by this Complaint, Green Springs engaged in the business of deciding the terms and conditions under which members of the class would be allowed to have their professional services utilized by managed mental healthcare organizations throughout substantial portions of the United States.

16. Defendant Human Affairs International, Inc. ("Human Affairs") is a Utah corporation with its principal place of business in Sandy City, Utah. During the time period covered by this Complaint, Human Affairs engaged in the business of deciding the terms and conditions under which members of the class would be allowed to have their professional services utilized by managed mental healthcare organizations throughout substantial portions of the United States.

17. Defendant Merit Behavioral Care Corp. ("Merit") is a Delaware corporation with its principal place of business in Park Ridge, New Jersey. During the time period covered by this Complaint, Merit engaged in the business of deciding the terms and conditions under which members of the class would be allowed to have their professional services utilized by managed mental healthcare organizations throughout substantial portions of the United States.

18. Defendant MCC Behavioral Care Inc. ("MCC") is a Minnesota corporation with its principal place of business in Eden Prairie, Minnesota. During the time period covered by this Complaint, MCC engaged in the business of deciding the terms and conditions under which members of the class would be allowed to have their professional services utilized by managed mental healthcare organizations throughout substantial portions of the United States.

19. Defendant United Behavioral Systems, Inc. ("UBS") is a Minnesota corporation with its principal place of business in Minnetonka, Minnesota. During the time period covered by this Complaint, UBS engaged in

the business of deciding the terms and conditions under which members of the class would be allowed to have their professional services utilized by managed mental healthcare organizations throughout substantial portions of the United States.

20. Defendant Value Behavioral Health, Inc. ("VBH") is a Delaware corporation with its principal place of business in Falls Church, Virginia. During the time period covered by this Complaint, VBH engaged in the business of deciding the terms and conditions under which members of the class would be allowed to have their professional services utilized by managed mental healthcare organizations throughout substantial portions of the United States.

21. Whenever any reference is made in this Complaint to any defendant or co-conspirator, the reference shall include any predecessors, successors, parents, subsidiaries, affiliates and divisions of that defendant or co-conspirator.

CO-CONSPIRATORS

22. Various other persons, firms, and corporations have participated as co-conspirators with the defendants and have performed acts and made statements in furtherance of the conspiracy and other acts complained of herein.

CLASS ACTION ALLEGATIONS

23. Plaintiffs bring this action on behalf of themselves and, under Rule 23 of the Federal Rules of Civil

Procedure, as representatives of a class (the "Class") defined as follows:

> All persons or entities in the United States who directly attempted to have their professional services as psychiatrists, psychologists, or social workers utilized in providing clinical mental health care, by any of the defendants or their co-conspirators at any time during the period from four years prior to the date of this Complaint to the present.
>
> Excluded from the Class are the defendants and their co-conspirators, and their respective subsidiaries and affiliates as well as all governmental entities.

24. The Class is so numerous that joinder of all class members would be impracticable. Although the exact number of Class members is presently unknown to plaintiffs, it is believed that the Class will number in the tens of thousands. The Class members are readily identifiable from information and records in the possession of the defendants and otherwise because the Class is limited to persons or entities who directly attempted to sell their services to defendants or their co-conspirators during the relevant time period.

25. Plaintiffs' claims are typical of the claims of the members of the Class, because plaintiffs and all Class members were damaged by the same wrongful conduct of the defendants alleged herein.

26. Plaintiffs will fairly and adequately protect the interests of the Class. The interests of plaintiffs are coincident with, and not antagonistic to, those of the Class. In addition, plaintiffs are represented by counsel who are

experienced and competent in the prosecution of complex and class action antitrust litigation.

27. Questions of law and fact common to the members of the Class predominate over questions which may affect only individual members, if any, in that defendants have acted on grounds generally applicable to the entire Class. Among the questions of law and fact common to the Class are:

(a) whether defendants violated Section 1 of the Sherman Act;

(b) the existence, duration, and illegality of the contract, combination and/or conspiracy alleged herein;

(c) whether defendants and each of them was a member of, or participant in the contract, combination and/or conspiracy alleged herein;

(d) the effect upon and the extent of injuries sustained by plaintiffs and members of the Class and the appropriate type and/or measure of damages; and

(e) whether plaintiffs and the members of the Class are entitled to declaratory and/or injunctive relief.

28. Class action treatment is superior to the alternatives, if any, for the fair and efficient adjudication of the controversy alleged herein, because such treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of evidence, effort and expense that numerous individual actions would engender. Class treatment will

also permit the adjudication of relatively small claims by certain Class members, who could not afford to individually litigate an antitrust claim against large corporate defendants.

29. Plaintiffs know of no difficulty to be encountered in the management of this action that would preclude its maintenance as a class action.

INTERSTATE TRADE AND COMMERCE

30. The trade and commerce relevant to this action is in the provision of professional services for mental health care. During the relevant time period commencing four years prior to the filing of this Complaint and continuing to date, the defendants and their co-conspirators determined whether and under what terms providers of professional services for mental health care would be able to sell their services throughout the United States.

31. During the relevant time period, the defendants and their co-conspirators transacted business in professional services for mental health care in a continuous and uninterrupted flow of interstate commerce to clients and providers located in states throughout the United States. The defendants also regularly made and received payments for providing professional services for mental health care across state lines.

32. The activities of the defendants and their co-conspirators, as described herein, were within the flow of and had a substantial effect upon interstate commerce.

DEFENDANTS' UNLAWFUL CONTROL OVER MENTAL HEALTH CARE PROVIDERS

33. Mental Health disorders affect an appreciable part of the population of the United States. Recent studies have concluded that nearly half of all Americans endure such a disorder at least once in their lives; that depression and mood disorders alone cost more than $11 billion annually in missed work days and billions more in lowered productivity; and that professional treatment, when properly administered, can be effective in 80-90 percent of the cases.

34. Managed health care has grown in importance in the United States in recent years. It is now controlled in substantial part by companies, called herein managed care organizations ("MCO's"), who contract with employers to provide medical care to their employees.

35. Increasingly in recent years, MCO's have "carved out" mental health matters and have treated them differently from the way they treat other health matters. In particular, they have turned over mental health matters to a specialized group of companies called herein managed mental healthcare organizations ("MMHO's").

36. By contract, the MMHO's have undertaken to decide when and under what circumstances subscribers to the MCO's will be entitled to have their mental health care needs paid for by someone other than themselves.

37. The MMHO's are commonly paid for their services on a "capitated" basis – that is, they receive a fixed periodic payment frequently based on the number of subscribers covered by the MCO's. The MMHO's, in turn,

pay for the mental health care they authorize for the subscribers. Other forms of risk-shifting arrangements are also used. In furtherance of this system, the MMHO's contract with providers of professional services for mental health care. These contracts specify the fees and terms under which the providers agree to sell their services to the MMHO's.

VIOLATIONS ALLEGED

38. The risk-shifting methods of compensation place the MMHO's in an irreconcilable conflict of interest situation since the more mental health care they authorize, the lower their short term profits will be.

39. This method of compensation, among other factors, as well as a growing threat to their way of doing business caused by dissatisfaction among providers, patients, and other members of the public, caused the MMHO's to join together to agree on a common course of action seeking to perpetuate and maintain the system that had been created in an effort to maximize their own profits at the expense of the members of the class.

40. Beginning at least as early as four years prior to the date of this Complaint, the exact dates being unknown to plaintiffs, defendants and their co-conspirators entered into and engaged in a continuing nationwide contract, combination and/or conspiracy in unreasonable restraint of the trade and commerce described above in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. This contract, combination and/or conspiracy has continued to the present day.

41. The aforesaid contract, combination and/or conspiracy has consisted of a continuing agreement, undertaking, and concert of action among the defendants and their co-conspirators, the substantial terms of which were to fix, lower, maintain and stabilize the professional fees that could be earned by plaintiffs and the class members, and to exclude from competition by boycotts, coercion and intimidation, any class member who attempted to thwart the goal of the contract, combination and/or conspiracy.

42. As part and parcel of their contract, combination and/or conspiracy, and in furtherance thereof, defendants did those things which they contracted, combined and/or conspired to do, including the following:

(a) acted jointly and in concert to fix, lower, maintain and stabilize the professional fees that could be earned by members of the class;

(b) acted jointly and in concert to enforce policies which tended to and did exclude the members of the class from competition, including the following:

(i) putting themselves in inherent conflict of interest situations by accepting capitated or other forms of risk-shifting payments;

(ii) insisting on cost-cutting methods that were not justified under the circumstances, including the in appropriate use of:

- short-term mental health care therapy;
- medication to minimize mental health care therapy; and

– inexpensive classes of mental health care providers;

(iii) intruding into confidential matters and imposing "gag" (or "nondisparagement") orders to facilitate their cost-cutting measures;

(iv) refusing to share their criteria or the names of the network participants;

(v) refusing to disclose (or affirmatively misrepresenting) their policies;

(vi) excluding or terminating providers who did not accept their policies;

(c) refrained from price competition with one another on competing for professional services for mental health care provided by the class;

(d) met together on numerous occasions and have, thus, had the opportunity to communicate with one another about fees and other terms of engagement of the members of the class and have, in fact, done so, and

(e) acted jointly and in concert, through the American Managed Behavioral Healthcare Association, the National Committee for Quality Assurance, and otherwise, at meetings and through mailings and publications, telephone and other forms of communication, to insure that the defendants and their co-conspirators would reach the agreements described in this paragraph and not deviate from those agreements.

43. Each of the defendants has engaged in one or more overt acts in furtherance of the contract, combination and/or conspiracy alleged.

44. The contract, combination and/or conspiracy has had and, unless enjoined, threatens to continue to have the following effects, among others:

(a) fees for professional services for mental health care charged by plaintiffs and members of the class have been fixed, lowered, maintained and stabilized at artificially low and noncompetitive levels throughout the United States;

(b) price competition in the sale of professional services for mental health care to defendants and their co-conspirators has been restrained, suppressed and eliminated throughout the United States; and

(c) plaintiffs and other class members have been deprived of the benefit of free and open competition in connection with the sales of their professional services for mental health care to defendants and their co-conspirators.

45. As a direct and proximate result of the unlawful conduct of the defendants and their co-conspirators during the relevant time period, plaintiffs and members of the class have not been able to sell their professional services for mental health care at prices determined by free and open competition and plaintiffs and members of the class were injured in their business and property in that, among other things, they have received less for their professional services for mental health care than they

would have otherwise received in a free and open competitive market.

46. As a result of the contract, combination and/or conspiracy, plaintiffs and each member of the class have been injured and damaged in an amount presently undetermined.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that:

(a) the court determine that this action may be maintained as a class action under Rule 23(b)(3) of the Federal Rules of Civil Procedure, and direct that reasonable notice of this action, as provided by Rule 23(c)(2) of the Federal Rules of Civil Procedure, be given each and every member of the class;

(b) the unlawful contract, combination and/or conspiracy alleged herein be adjudged and decreed to be an unreasonable restraint of trade or commerce in violation of Section 1 of the Sherman Act;

(c) plaintiffs and each and every member of the class recover three-fold the damages determined to have been sustained by each of them and that joint and several judgments in favor of plaintiffs and each and every member of the class be entered against the defendants and each of them;

(d) defendants be enjoined from continuing the unlawful contract, combination and/or conspiracy alleged herein;

(e) plaintiffs and other members of the class recover their cost of this suit, including reasonable attorney's fees as provided by law; and

(f) plaintiffs and other members of the class be granted such other, further and different relief as the nature of the case may require or as may be just, equitable and proper to this Court.

JURY DEMAND

PLEASE TAKE NOTICE that plaintiffs demand a trial by jury, pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, of all issues triable of right by a jury.

Dated: New York, NY
October 15, 1996

Respectfully submitted,

On behalf of the Plaintiffs
Individually, Members of the
Plaintiff Organizations, and All
Others Similarly Situated,

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SUPREME COURT, U.S.

No. 98-1304

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

EDWARD M. STEPHENS, M.D., JOSÈ A. YARYURA-TOBIAL, M.D., JUDITH GREEN, PH.D., AGNES NEZIROGLU, PH.D., ONA ROBINSON, PH.D., AGNES WOHL, C.S.W., AND THE ON-STEP INSTITUTE FOR MENTAL HEALTH RESEARCH, INC., individually and on behalf of all others similarly situated,

Petitioners,

v.

CMG HEALTH, FHC OPTIONS, INC., FOUNDATION HEALTH PSYCHCARE SERVICES, INC., GREEN SPRING HEALTH SERVICES, INC., HUMAN AFFAIRS INTERNATIONAL, INC., MERIT BEHAVIORAL CARE CORP., MCC BEHAVIORAL CARE INC., UNITED BEHAVIORAL SYSTEM, INC., AND VALUE BEHAVIORAL HEALTH, INC.,

Respondents.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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2398

QUESTIONS PRESENTED

1) Whether a District Court may dismiss a complaint asserting an antitrust conspiracy where the complaint alleges no facts showing either collusion among the defendants or antitrust injury, on the grounds that it does not contain the "short and plain statement of the claim showing that the pleader is entitled to relief" mandated by Federal Rule of Civil Procedure 8(a)(2).

2) Whether a plaintiff who fails to survive a Rule 12(b)(6) motion has an absolute right to file an amended complaint even though the plaintiff never filed or proffered an amended complaint, and the district court properly found that the filing of an amended complaint would be futile and prejudicial.

RULE 29.6 LISTINGS

Respondent (defendant and appellee below) MCC Behavioral Care, Inc. is a wholly-owned subsidiary of Connecticut General Corporation, which is a wholly-owned subsidiary of CIGNA Holdings, Inc., which is a wholly-owned subsidiary of CIGNA Corporation, a publicly-held corporation. MCC Behavioral Care, Inc. has no nonwholly owned subsidiaries.

Respondents (defendants and appellees below) CMG Health, Inc., Green Spring Health Services, Inc., Human Affairs International, Inc., and Merit Behavioral Care Corp. are direct and indirect wholly owned subsidiaries of Magellan Health Services, Inc. ("Magellan"), a publicly-held corporation. Respondent CMG Health, Inc. is a direct wholly owned subsidiary of Respondent Merit Behavioral Care Corp., which is wholly owned by MBCH, Inc., a direct wholly owned subsidiary of Magellan. Respondent Green Spring Health Services, Inc. and Respondent Human Affairs International, Inc. are each direct wholly owned subsidiaries of Magellan, and have no nonwholly owned direct subsidiaries. Nonwholly owned direct subsidiaries of CMG Health, Inc. are: Choice Behavioral Health Partnership; Maryland Health Partners, LLC; and Montana Community Partners, Inc. Nonwholly owned direct subsidiaries of Merit Behavioral Care Corp. are: BCOV-GP, Inc.; Continuum Behavioral Care, LLC; EHMC-MBC of New York, LLC; and MBC of Tennessee, LLC.

Respondent (defendant and appellee below) FHC Options, Inc. changed its name to OPTIONS Health Care, Inc. Respondent (defendant and appellee below) Value Behavioral Health, Inc. merged with and into OPTIONS Health Care, Inc., and the surviving company was renamed ValueOptions, Inc. The parent corporation of ValueOptions, Inc. is FHC Health Systems, Inc. ValueOptions, Inc. has no nonwholly owned subsidiary corporations.

RULE 29.6 LISTINGS (cont'd)

Respondent (defendant and appellee below) Foundation Health Psychcare Services, Inc. has merged with and into Managed Health Network, Inc., and has the following parent corporations: Foundation Health Corporation and Foundation Health Systems, Inc.

Respondent (defendant and appellee below) United Behavioral Services, Inc. is a wholly-owned subsidiary of United Behavioral Health, which is a wholly-owned subsidiary of United HealthCare Services, Inc., which in turn is a wholly-owned subsidiary of United HealthCare Corporation. United Behavioral Systems, Inc. does not have any non-wholly owned subsidiaries.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 29.6 LISTINGS	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	1
BACKGROUND	3
ARGUMENT	6
I. THE COURT SHOULD DENY CERTIORARI ON THE RULE 8(a) ISSUE	6
A. The Decisions Below Reflect A Straightforward Application Of Rule 8(a)	6
B. There Is No Conflict In The Circuits Or With This Court Concerning The Proper Pleading Standards	7
II. THE COURT SHOULD DENY CERTIORARI ON THE PLAINTIFFS' ASSERTED "ABSOLUTE RIGHT" TO REPLEAD	10
A. Plaintiffs Did Not Raise This Question Below	10
B. No Circuit Grants An Absolute Right To Submit A Futile Amended Complaint After The Dismissal Of The Case	11
CONCLUSION	14

TABLE OF AUTHORITIES

Page

Cases

Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983) 8

Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990) 4

Auer v. Robbins, 519 U.S. 452 (1997) 11

Brader v. Allegheny General Hospital, 64 F.3d 869 (3d Cir. 1995) 7, 9

Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986) 4

City of Pittsburgh v. West Penn Power Co., 147 F.3d 256 (3d Cir. 1998) 10

Confederate Memorial Association, Inc. v. Hines, 995 F.2d 295 (D.C. Cir. 1993) 13

Conley v. Gibson, 355 U.S. 41 (1957) 6, 8, 9

Cook, Perkiss and Liehe, Inc. v. Northern California Collection Service Inc., 911 F.2d 242 (9th Cir. 1990) 12

Doe v. United States, 58 F.3d 494 (9th Cir. 1995) 12

EEOC v. Federal Labor Relations Authority, 476 U.S. 19 (1986) (per curiam) 11

Foman v. Davis, 371 U.S. 178 (1962) 12

Hammes v. AAMCO Transmissions, Inc., 33 F.3d 774 (7th Cir. 1994) 7, 9

Heart Disease Research Foundation v. General Motors Corp., 463 F.2d 98 (2d Cir. 1972) 7

Jarvis v. Regan, 833 F.2d 149 (9th Cir. 1987) 12

Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163 (1993) 2, 7, 8, 9

Lindauer v. Rogers, 91 F.3d 1355 (9th Cir. 1996) . . 12, 13

TABLE OF AUTHORITIES (cont'd)

Page

Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984) 3
Nynex Corp. v. Discon, Inc., 119 S.Ct. 493 (1998) 8
Schuylkill Energy Resources, Inc. v. Pennsylvania Power & Light Co., 113 F.3d 405 (3d Cir.), *cert. denied*, 118 S.Ct. 435 (1997) 10
United States ex rel. Richard Saaf v. Lehman Brothers, 123 F.3d 1307 (9th Cir. 1997) 11, 13
Westlands Water District v. Firebaugh Canal, 10 F.3d 667 (9th Cir. 1993) 13

Statutes and Rules

15 U.S.C. § 1 . . . . . 1, 3
28 U.S.C. § 1254(1) 1
Sup. Ct. R. 10 7
Fed. R. Civ. P. 8 . . . . . 6, 7, 9
Fed. R. Civ. P. 9 9
Fed. R. Civ. P. 12 . . . . . 2, 7
Fed. R. Civ. P. 15 . . . . . 2, 10

OPINIONS BELOW

The Summary Order of the court of appeals (Pet. App. 1a-4a) is unreported. The decision of the district court (Pet. App. 5a-7a; J.A. A-100)[1] is unreported. The Report and Recommendation of the magistrate judge (Pet. App. 8a-43a) is also unreported.

JURISDICTION

The mandate of the court of appeals was entered on December 7, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The plaintiffs in this case are mental healthcare providers who believe that managed care health plans should pay the plaintiffs more money than they do. The five judges who considered the complaint below quickly and unanimously recognized that it suffered from two fatal flaws. First, although the claim asserted was a conspiracy under Section One of the Sherman Act, no fact was alleged to allow an inference that the conduct complained of was undertaken collusively — as a result of an actual agreement among the defendants — rather than for each defendant's own independent business reasons. The second flaw was the failure to allege any fact showing antitrust injury — that is, harm flowing from a marketwide reduction in competition — as opposed to the simple assertion that defendants (and ultimately consumers) should pay more for the plaintiffs' services. These flaws were sufficiently obvious that the Second Circuit Court of Appeals summarily affirmed the dismissal below in a one-half page, unpublished decision noting that a plaintiff may not institute a massive antitrust class action based solely on "'a bare bones statement of conspiracy

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[1] References to the transcript of the district court hearing will cite the Joint Appendix ("J.A. A-__.") submitted to the Second Circuit.

or of injury under the antitrust laws without any supporting facts.'" Pet. App. 3a.

Neither below nor in this Court have plaintiffs attempted to point to any fact in the complaint that would cure these deficiencies. As a result, plaintiffs must attempt to obtain review in this Court by framing questions presented that, even if answered as plaintiffs would like, would still result in affirmance of the decision below. The first question is a truism; plaintiffs would have this court hold that Rule 8(a)(2) means what it says. But that will not help the plaintiffs here unless, as they argued to the Court of Appeals, this Court's decision in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), silently overruled the unanimous view of all circuits that conclusory pleading is insufficient to state a claim on which relief may be granted. As shown below, that argument finds no support in *Leatherman*, and is flatly contradicted by other decisions of this Court affirming the dismissal of antitrust complaints under Rule 12(b)(6).

The second question presented by plaintiffs — claiming an "absolute right" to file an amended complaint whenever a Rule 12(b)(6) motion is lost — is a question that was neither argued nor considered in the courts below, and hence classically inappropriate for review by this Court. Beyond that, plaintiffs' assertion of an "absolute right" under Rule 15 is difficult to comprehend when plaintiffs failed to invoke the rule either by filing a motion or by tendering an amended complaint (despite numerous opportunities to do so). Notwithstanding that failure, the district court still inquired at length as to the new allegations plaintiffs would add if permitted and concluded that such an amendment would be both futile and prejudicial to defendants — an exercise of discretion not challenged by plaintiffs in this petition. Thus, even if this Court were inclined to "review" an issue neither raised nor ruled upon below,

plaintiffs' attempt to manufacture a split in the circuits under Rule 15 would fail; no circuit court has granted or would grant an "absolute" right to replead under the circum-stances presented here.

BACKGROUND

Plaintiffs, purporting to represent a nationwide class of mental health care providers (Pet. App. 50a-53a), claim that defendants, whom plaintiffs refer to as "managed mental healthcare organizations" (Pet. App. 54a), agreed to lower the fees that they pay plaintiffs for their services. Pet. App. 56a. Plaintiffs assert that this purported agreement constitutes an unlawful restraint of trade in violation of Section 1 of the Sherman Act (15 U.S.C. § 1). Pet. App. 55a.

Defendants moved to dismiss the Complaint, arguing that plaintiffs had not sufficiently alleged either the existence of a conspiracy or a resulting antitrust injury. The motion was referred to a magistrate judge for a report and recommendation. Plaintiffs chose not to file an amended complaint. Instead, they filed an opposing brief, in which they requested leave to replead should the motion to dismiss be granted without stating what additional allegations they might include in an amended complaint. While the motion to dismiss was pending, plaintiffs conducted limited discovery under the supervision of the magistrate judge.

The magistrate judge recommended that the Complaint be dismissed. To show a violation of Section 1 of the Sherman Act, a plaintiff must show that defendants entered into a "'contract, combination . . . or conspiracy.'" *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984); 15 U.S.C. § 1. Regarding this element, the magistrate judge wrote:

> The complaint contains nothing more than generalized, conclusory allegations that defendants "fixed, lowered,

> maintained and stabilized" fees. . . . In short, there are no concrete assertions that any defendant is acting similarly to any other.

Pet. App. 21a-22a. In order to have standing to complain of a violation of the Sherman Act, every plaintiff, whether or not invoking a *per se* theory of liability, must establish antitrust injury. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334, 344 (1990); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 111 (1986). Regarding this element, the magistrate judge found that the Complaint failed to allege harm to competition and the market, and therefore failed to allege antitrust injury. "Plaintiffs have failed to allege any harm other than the thwarting of their desire to charge more for their services." Pet. App. 34a. Noting that plaintiffs proffered neither an amended complaint nor "any factual allegations they failed to include in the current complaint," the magistrate judge found that the request to amend the Complaint should be denied as futile. Pet. App. 40a-41a.

Plaintiffs then urged that the district court should reject the magistrate judge's Report and Recommendation, and there was additional briefing in the district court. Plaintiffs again chose not to proffer a proposed amended complaint. At oral argument, the district court nevertheless gave plaintiffs every opportunity to proffer additional facts that plaintiffs would allege if they were given the opportunity to amend. Thus, she directed, at the very beginning of the argument,

> . . . what I want [plaintiffs] to focus on in oral argument is what facts you believe indicate that defendants entered into an anticompetitive agreement here. . . . I think defense counsel rightly point out that you have failed on a number of opportunities to state those facts. So here is your last opportunity before I accept, if that is what I am going to do, the magistrate judge's report and recommendation.

J.A. A-63. Nonetheless, when asked to describe the facts at his disposal, plaintiffs' counsel admitted, "I didn't come here prepared to address these things and I am talking off the top of my head right now." *Id.* at A-86—A-87. When the court requested that counsel show her the most important documents buttressing his case, he stated that he did not have them with him. *Id.* at A-66, A-70. When asked to produce them, he claimed that no one was at his office to find them. *Id.* at A-71—A-72. When he claimed that there were damaging statements from certain documents quoted in his Objections to the Report, the district court observed that the partial "quotations" in the Objections did not contain citations to any source. *Id.* at A-85—A-86. On inquiry, plaintiffs were unable to identify the documents. *Id.* at A-86. Rather than setting out how they would allege antitrust injury, plaintiffs instead admitted that they had identified neither relevant markets nor barriers to entry. *Id.* at A-93, A-94.

At the end of the hearing, the district court stated, "I do believe that any attempt at amendment would be futile. From what I have heard so far, I do not believe that the facts at plaintiffs' counsel's disposal are sufficient to rescue the complaint." J.A. A-100. In a written order, the district court confirmed her ruling, and elaborated on the reasons why allowing leave to amend the complaint would be both futile and prejudicial. Pet. App., 5a-7a.

Plaintiffs appealed to the Second Circuit. The parties again briefed the issues, and participated in oral argument. The panel unanimously affirmed. In an unpublished Summary Order, the panel concluded that the Complaint should be dismissed because "'a bare bones statement of conspiracy or of injury under the antitrust laws without any supporting facts permits dismissal.'" Pet. App. 3a. The panel also held that the district court's determination not to allow repleading was not an abuse of discretion because "[a]lthough questioned extensively by the

district judge as to what amendments would be made to an amended pleading, plaintiffs' counsel failed to supply any satisfactory proposal that would cure the deficiency." *Id.*

ARGUMENT

I. THE COURT SHOULD DENY CERTIORARI ON THE RULE 8(a) ISSUE.

A. The Decisions Below Reflect A Straightforward Application Of Rule 8(a).

Plaintiffs, quoting the language of Rule 8(a), ask this Court to determine "[w]hether the Federal Rules of Civil Procedure require more to be pleaded than the short and plain statement of the claim showing plaintiffs are entitled to relief in an antitrust action." Pet. i. And, of course, the answer is no. The unpublished opinions entered below applied this standard, and there is no conflict of authority on this question. There is therefore no issue of law for this Court to review, merely the application of the well-known, and properly stated, standard for dismissal as applied to the specific factual allegations in the Complaint at hand.

The decisions below explicitly state that they are applying the ordinary pleading standard set out in Rule 8(a). The magistrate judge's discussion of the appropriate legal standard (Pet. App. 11a-13a) cites the Supreme Court's decision in *Conley v. Gibson*, 355 U.S. 41 (1957), and the Second Circuit cases that applied it. She held:

> It is clear that this standard applies to antitrust cases, and that antitrust plaintiffs are not required to plead with any additional specificity beyond that required by Fed. R. Civ. P. 8(a).

Id. at 12a. The magistrate judge then carefully sifted through the allegations in the Complaint, determined that the Complaint

failed to sufficiently allege either a conspiracy among the defendants or resulting antitrust injury, and accordingly recommended dismissal. The district court adopted the Report and Recommendation (Pet. App., 5a), finding that the magistrate judge "correctly stated the law and correctly applied the law to the facts that were before her." J.A. A-96.

The Second Circuit considered, and rejected, plaintiffs' argument that the district court "inappropriately appl[ied] a heightened pleading standard." Pet. App., 3a. The Second Circuit concluded that "the district court did not hold plaintiffs to a heightened pleading standard, but rather correctly applied Fed. R. Civ. P. 8(a), 12 (b)(6), and associated caselaw." *Id.*

There is no occasion for this Court to determine whether the lower courts properly applied Rule 8(a). "A petition for writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10. And here, in any event, Rule 8(a) was properly applied below.

B. There Is No Conflict In The Circuits Or With This Court Concerning The Proper Pleading Standards.

Plaintiffs argue that one of the cases the judges below relied on, *Heart Disease Research Foundation v. General Motors Corp.*, 463 F.2d 98 (2d Cir. 1972), is in conflict with the decisions of this Court and the decisions of the Seventh and Third Circuits.[2] It is not. In *Heart Disease Research*, *id.* at 100, and again in the decision below, Pet. App. 3a, the Second Circuit held that a "bare bones" assertion of an antitrust

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[2] Pet. 12, *citing Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993); *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774 (7th Cir. 1994); *Brader v. Allegheny General Hospital*, 64 F.3d 869 (3d Cir. 1995).

violation can be dismissed if made "without any supporting facts." It therefore appears to be plaintiffs' contention that the Supreme Court, and certain circuit courts, have held that the existence of an antitrust claim may be successfully pleaded "without any supporting facts."

The decisions below holding that antitrust claims may not be pleaded "without any supporting facts" are consistent with this Court's decision to dismiss an antitrust complaint in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983). This Court wrote that "a district court must retain the power to insist on some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Id.* at 528 n.17 (discussing "the rule of *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957)"). Although a court should assume that a plaintiff can prove the facts actually alleged, "[i]t is not, however, proper to assume that the [plaintiff] can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged." 495 U.S. at 526. Relying in part on the *absence* of certain factual claims (*id.* at 542), the Supreme Court ruled that "based on the allegations of this complaint, the District Court was correct in concluding that the [plaintiff] is not a person injured by reason of a violation of the antitrust laws within the meaning of § 4 of the Clayton Act." *Id.* at 545-46; *compare Nynex Corp. v. Discon, Inc.*, 119 S.Ct. 493 (1998) (dismissing allegations of *per se* violations of the Sherman Act).

No authority permits antitrust claims to be pleaded "without any supporting facts." Rule 8(a), for example, demands that the statement of the claim "show[ ] that the pleader is entitled to relief." Nor, as plaintiffs assert, (Pet. 11, 13-14) did *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), "implicitly over-rule[ ]" *Heart Disease Research*. *Leatherman*, a civil rights

case, never cited *Heart Disease Research* or any other antitrust case. Rather, *Leatherman* considered the express adoption by the Fifth Circuit of a judge-made rule that would require greater specificity than mandated by Rule 8(a)(2) in cases where public officials named as defendants had a potential claim of immunity from suit. While striking down the notion that a "heightened pleading standard" is permissible for claims other than those listed in Rule 9(b), the *Leatherman* court did not analyze the requirements of Rule 8(a) other than to restate the "notice pleading" rule of *Conley v. Gibson*, 355 U.S. at 47. That rule, however, does not reduce the pleading requirement to nothing; a complaint must give fair notice not just of what the claim is, but also "'the grounds upon which it rests.'" *Leatherman*, 507 U.S. at 168, *quoting Conley*, 355 U.S. at 47.

There likewise is no conflict between the Second Circuit's determination in *Heart Disease Research* and the Seventh Circuit's decision in *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774 (7th Cir. 1994). *Hammes* holds that the jurisdictional predicate of antitrust cases, effect on interstate commerce, need not be pleaded in detail. *Hammes*, 33 F.3d at 778. But unlike the allegations here involved, the allegations in question in *Hammes* contained supporting facts. The *Hammes* complaint alleged that the defendant sold "franchises in several states," and that the plaintiff franchisee "mailed substantial fees" to defendant, "contributed money to [defendant's] national advertising," and "'purchased equipment and inventory'" from defendant. *Id.*[3] Nor, as plaintiffs imply, did the Third Circuit in *Brader v. Allegheny General Hospital*, 64 F.3d 869 (3d Cir. 1995), abandon the need to plead the necessary elements of an antitrust claim, including antitrust

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[3] The *Hammes* court also stressed that pleading details regarding effect on interstate commerce was unnecessary because "the number of cases that fail at that threshold has become minuscule." 33 F.3d at 778.

injury. *See City of Pittsburgh v. West Penn Power Co.*, 147 F.3d 256, 265 (3d Cir. 1998) (affirming Rule 12(b)(6) dismissal of complaint for failure to allege antitrust injury); *Schuylkill Energy Resources, Inc. v. Pennsylvania Power & Light Co.*, 113 F.3d 405, 417-18 (3d Cir.) (same), *cert. denied*, 118 S.Ct. 435 (1997).

Accordingly, there is no conflict in the circuits concerning the appropriate pleading standard. The courts below dismissed the Complaint because it pleaded less than what is mandated by Rule 8(a), which rule is uniformly applied by this Court and every circuit. Plaintiffs present no issue that merits further review in this Court.

II. THE COURT SHOULD DENY CERTIORARI ON THE PLAINTIFFS' ASSERTED "ABSOLUTE RIGHT" TO REPLEAD

A. Plaintiffs Did Not Raise This Question Below

Plaintiffs would have this Court declare that Federal Rule of Civil Procedure 15(a) grants plaintiffs an "absolute right to amend a complaint at least once where it has been dismissed as insufficiently particular. . . ." Pet. i. No opinion below focused on this question, (*e.g.* Pet. App., 1a-4a), for the simple reason that plaintiffs never presented this question to any court other than this one. Plaintiffs never even cited Rule 15 to any court below. To be sure, plaintiffs unsuccessfully disputed the district court's determination that leave to replead would be futile and prejudicial (Pet. App. 5a-7a). But nowhere in the entire record did plaintiffs even hint that repleading was a question of "absolute right," and not a matter committed to the discretion of the district court. On the contrary, plaintiffs correctly informed the Second Circuit that "The District

Court's refusal to grant leave to file an amended complaint is reviewed for an abuse of discretion." App. Br. at 17.[4]

This Court's "normal practice . . . is to refrain from addressing issues not raised in the Court of Appeals." *EEOC v. Federal Labor Relations Auth.*, 476 U.S. 19, 24 (1986) (per curiam) (dismissing writ of certiorari as improvidently granted); *accord Auer v. Robbins*, 519 U.S. 452, 464 (1997). To do otherwise would require the Court to embark on a fresh legal analysis entirely uninformed by the consideration or resolution of this question in the courts below. There is no reason to depart from the Court's normal practice in this case.

B. No Circuit Grants An Absolute Right To Submit A Futile Amended Complaint After The Dismissal Of The Case.

Plaintiffs claim that they were denied "their absolute right to amend" (Pet. 19), and that it was error for the district court to "apply[ ] concepts such as 'prejudice' and 'futility' to the determination of petitioners' request" to amend. Pet. 20. Plaintiffs concede that the district court's decision was "in keeping with Second Circuit requirements." *Id.*; *accord* Pet. at 5.

Plaintiffs claim, however, to have identified a circuit split regarding the right to replead between the court below and Second Circuit precedent, on the one hand, and the Ninth Circuit, on the other. Pet. 20, *citing United States ex rel. Richard Saaf v. Lehman Brothers*, 123 F.3d 1307, 1308 (9th Cir. 1997) ("Neither the filing nor granting of . . . a motion [to dismiss] before answer terminates the right to amend"). Plaintiffs are wrong. No circuit grants an "absolute right to amend," since in all circuits the futility of amendment bars

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[4] The relevant excerpt from this brief is appended to this Opposition.

repleading. *See Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995) (repleading should not be permitted where the district court "determines that the pleading could not possibly be cured by the allegation of other facts"); *Cook, Perkiss and Liehe, Inc. v. Northern California Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990).

The district court here carefully reviewed the Complaint, the parties' briefs, and the magistrate judge's Report and Recommendation, and at oral argument directed plaintiffs to state what additional facts they could plead. J.A. A-63. Since plaintiffs never proffered an amended complaint, and since the district court's inquiry revealed no facts at plaintiffs' disposal that could cure the flaws in the original complaint, the Second Circuit was correct to conclude that "[t]he district court was within its discretion in finding that granting permission to amend would be both futile and prejudicial." Pet. App., 3a-4a. Neither the Ninth Circuit nor any other circuit requires district courts to permit the filing of an amended complaint where such an act has been determined to be futile. *See Cook, Perkiss and Liehe*, 911 F.2d at 247 (9th Cir.) (affirming refusal to permit repleading where "the district court determined that the pleading could not be cured by the allegation of other facts").

Furthermore, some Ninth Circuit panels have held that the right to amend a complaint does not survive an adverse judgment. "Where a final judgment is entered following dismissal of an action, the plaintiff no longer has the right to amend the complaint as a matter of course. . . . Under these circumstances, the appellants' amendment could be made only by leave of the court." *Jarvis v. Regan*, 833 F.2d 149, 155 (9th Cir. 1987), *quoted by Lindauer v. Rogers*, 91 F.3d 1355, 1357 (9th Cir. 1996); *see Foman v. Davis*, 371 U.S. 178, 179, 182 (1962) (plaintiff attempted to amend the complaint after a motion to dismiss was granted; leave to amend "is within the discretion of the District Court," which may consider such

issues as prejudice and futility). Although plaintiffs early on asked for leave to amend in the event the motion to dismiss were granted, plaintiffs never attempted to file or proffer an amended complaint. As the Ninth Circuit has noted, "the district court's discretion is particularly broad where the plaintiff has bypassed other opportunities to amend." *Westlands Water Dist. v. Firebaugh Canal*, 10 F.3d 667, 677 (9th Cir. 1993); *accord Confederate Memorial Ass'n, Inc. v. Hines*, 995 F.2d 295, 299 (D.C. Cir. 1993) ("a bare request in an opposition to a motion to dismiss . . . does not constitute a motion within the contemplation of Rule 15(a)"). After a district court enters judgment, in either the Second or Ninth Circuits, "a motion to amend the complaint can only be entertained if the judgment is first reopened under a motion brought under Rule 59 or 60," a motion that plaintiffs never brought. *Lindauer*, 91 F.3d at 1357. It thus appears that each determination as to whether a plaintiff should be permitted to replead depends on the unique facts presented in that case. Any tensions that may exist between the Ninth Circuit decisions in *Lindauer*, *Westlands Water*, and *Jarvis* and the Ninth Circuit decision cited by plaintiffs, (*see Saaf*, 123 F.3d at 1308) should be addressed in the first instance by that circuit court.

Accordingly, petitioners' eleventh hour assertion of an absolute right to amend does not merit this Court's attention.

CONCLUSION

For the reasons stated above, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

[filed July 7, 1998]

APPELLANTS' BRIEF ON APPEAL
Filed in Case No. 98-7750
before the
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[17] ***

I. The Standard for Reviewing a District Court's Dismissal Pursuant to F.R.C.P. 12(b)(6).

This Court's review of the District Court's dismissal, like the District Court's review of the Magistrate Judge's Report, is de novo in that an independent determination of the controversy is required and no deference to any prior resolution would be appropriate. *E.g., De Jesus v. Sears, Roebuck & Co., Inc.*, 87 F.3d 65, 69 (2d Cir. 1996) (reviewing this Court's role); *Moore v. Scully*, 956 F. Supp. 1139, 1143 (S.D.N.Y. 1997) (reviewing the District Court's role pursuant to F.R.C.P. 72(b)).

This District Court's refusal to grant leave to file an amended complaint is reviewed for an abuse of discretion. *E.g., De Jesus*, 87 F.3d at 71.

II. The Standard for Deciding a Motion to Dismiss.

* * *

No. 98-1304

Supreme Court, U.S.
FILED
MAR 26 1999
CLERK

In The

Supreme Court of the United States

October Term, 1998

EDWARD M. STEPHENS, M.D., JOSÉ A. YARYURA-TOBIAS, M.D., JUDITH GREEN Ph.D., FUGEN NEZIROGLU, Ph.D., ONA ROBINSON, Ph.D., AGNES WOHL, C.S.W., and THE ON-STEP INSTITUTE FOR MENTAL HEALTH RESEARCH, INC., individually and on behalf of all others similarly situated,

Petitioners,

v.

CMG HEALTH, FHC OPTIONS, INC., FOUNDATION HEALTH PSYCHCARE SERVICES, INC., GREEN SPRING HEALTH SERVICES, INC., HUMAN AFFAIRS INTERNATIONAL, INC., MERIT BEHAVIORAL CARE CORP., MCC BEHAVIORAL CARE INC., UNITED BEHAVIORAL SYSTEMS, INC., and VALUE BEHAVIORAL HEALTH, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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10PP

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONERS 1

ARGUMENT 2

I. THE COURT'S PLEADING REQUIREMENTS SET FORTH IN *LEATHERMAN* APPLY TO ANTITRUST ACTIONS 2

II. THERE IS A DISTINCT CONFLICT BETWEEN CIRCUITS ON THE APPROPRIATE LEVEL OF PLEADING REQUIRED FOR AN ANTITRUST ACTION 3

III. PETITIONERS HAVE AN ABSOLUTE RIGHT TO SUBMIT AN AMENDED COMPLAINT UNDER RULE 15(a) 5

IV. A CONFLICT CONTINUES TO EXIST BETWEEN THE CIRCUITS REGARDING THE RIGHT TO AMEND UNDER RULE 15(a) 6

CONCLUSION 7

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983) 2, 3

Brader v. Allegheny General Hospital, 64 F.3d 869 (3d Cir. 1995) 1, 3, 4

City of Pittsburgh v. West Penn Power Comp., 147 F.3d 256 (3d Cir. 1998) 3

Cook, Perkiss and Liehe, Inc. v. Northern California Collection Service Inc., 911 F.2d 242 (9th Cir. 1990) 6

Doe v. United States, 58 F.3d 494 (9th Cir. 1995) 6

Hammes v. AAMCO Transmissions, Inc., 33 F.3d 774 (7th Cir. 1994) 1, 4, 5

Leatherman v. Tarrant County Narcotics, Intelligence and Coordination Unit, 507 U.S. 163 (1993) 1, 2, 3, 4, 5

Lundy v. Adamar of New Jersey, Inc., 34 F.3d 1173 (3d Cir. 1994) 3

Schuylkill Energy Resources, Inc., v. Pennsylvania Power & Light Co., 113 F.3d 405 (3d Cir. 1997) 3, 4

United States ex rel. Richard Saaf v. Lehman Brothers, et al., 123 F.3d 1307 (9th Cir. 1997) 6

Westland Water Dist. v. Firebaugh Canal, 10 F.3d 667 (9th Cir. 1993) 6

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Federal Rules of Civil Procedure

Rule 8(a) 2, 3, 4, 5

Rule 8(a)(2) 1, 2

Rule 9(b) 2

Rule 15(a) 5, 6

REPLY BRIEF FOR PETITIONERS

The Court's granting of this petition for certiorari would put to rest the conflict between the Second Circuit's decision in this case and the decisions of at least two other Circuit Courts of Appeals decisions. *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774 (7th Cir. 1994); *Brader v. Allegheny General Hospital*, 64 F.3d 869 (3d Cir. 1995). Moreover, a granted petition would resolve the Second Circuit's refusal to follow the Court's decision in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993). In affirming the District Court's order dismissing Petitioners' antitrust complaint, the Second Circuit decided to apply a "heightened pleading standard" diametrically opposed to the Court's unanimous decision that the Federal Rules of Civil Procedure require only "a short and plain statement of the claim." F. R. Civ. P. 8(a)(2). To prevent inappropriate judicial amending of the Federal Rules, the Court should grant this petition to reassert its decision in *Leatherman*.

Respondents' argument that both this Court and other Circuits uniformly dismiss antitrust complaints that do not specify facts in detail is wrong. Respondents attempt to cloud the Court's clear holding under *Leatherman* with inapposite cases focusing upon irrelevant issues of standing, analyzing case law superficially without regard to their context, and quoting incomplete dicta. These arguments should be firmly rejected and Petitioners respectfully request that the petition for certiorari be granted.

ARGUMENT

I. THE COURT'S PLEADING REQUIREMENTS SET FORTH IN *LEATHERMAN* APPLY TO ANTITRUST ACTIONS.

The *Leatherman* decision applies equally to all cases pled under Rule 8(a), including Petitioners' antitrust complaint. As Respondents would have it, *Leatherman* and Rule 8(a) would only apply to civil rights actions similar to the *Leatherman* facts. However, this Court unanimously held that "it is impossible to square the 'heightened pleading standard' . . . with the liberal system of 'notice pleading' set up by the Federal Rules." *Leatherman*, 507 U.S. at 168. The Second Circuit in reviewing the instant action decided that the requirement that a complaint include only a "short and plain statement of the claim showing that the pleader is entitled to relief" does not apply to antitrust actions. F. R. Civ. P. 8(a)(2). Rule 9(b), however, only imposes a particularity requirement in two specific instances; fraud and mistake. "Thus, the Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging" antitrust liability. *Id.*

Respondents inappropriately rely on a litany of antitrust cases injecting standing issues not raised in the lower courts nor relevant to the issues of this petition. Specifically, Respondents cite authority where this Court and other Circuits have dismissed antitrust claims for a lack of standing or failure to plead an element of an action. Resp. Br. 8-10. In *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459

U.S. 519 (1983), this Court upheld a dismissal based not on infirmity of the pleadings under Rule 8(a). Rather, the Court noted that the petitioners, a labor union, with additional factual pleading could not meet the injury requirements to maintain standing as an association. *Id.* at 545.

II. THERE IS A DISTINCT CONFLICT BETWEEN CIRCUITS ON THE APPROPRIATE LEVEL OF PLEADING REQUIRED FOR AN ANTITRUST ACTION.

Respondents' superficial attempts to demonstrate a lack of conflict between the Second and Third Circuits also fails. The Third Circuit, relying on *Leatherman*, expressly rejected a "heightened pleading standard" for antitrust actions. *Brader v. Allegheny General Hospital*, 64 F.3d 869, 876-77 (3d Cir. 1995). One year earlier, the Third Circuit considered "bare bones" pleading sufficient under Rule 8(a). *Lundy v. Adamar of New Jersey, Inc.*, 34 F.3d 1173, 1194 (3d Cir. 1994) (Becker, J. concurring in part and dissenting in part). The Third Circuit acknowledged that *Leatherman* foreclosed any questions surrounding notice pleading under the Federal Rules and that any such changes should be addressed solely by Congress. *Brader*, 64 F.3d at 877. Incorrectly, Respondents cite Third Circuit antitrust cases dismissing complaints based on the plaintiffs' lack of standing. *Schuylkill Energy Resources, Inc. v. Pennsylvania Power & Light Co.*, 113 F.3d 405 (3d Cir. 1997) (plaintiffs failed to prove an antitrust injury); *accord City of Pittsburgh v. West Penn Power Comp.*, 147 F.3d 256 (3d Cir. 1998). Also, in *Schuylkill*, the Third Circuit restated its policy that antitrust issues are "not typically resolved

through motions to dismiss." *Id.* at 417 (citing *Brader*, 64 F.3d at 876). Thus, Respondents' attempt to cast doubt on the Third Circuit's decision in *Brader* is without merit.

Respondents' attempt to resolve the conflict between the Second and Seventh Circuits also fails. Seventh Circuit Chief Judge Posner relied upon *Leatherman*'s interpretation of Rule 8(a) that a complainant is not required to "plead the particulars of [their antitrust] claim." *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 778 (7th Cir. 1994). Respondents seek to distinguish *Hammes* based upon the jurisdictional element at issue in that case and its sufficiently detailed pleadings. Resp. Br. at 9. However, Respondents fail to consider the liberally pleaded conspiracy element which also at issue in *Hammes* was found to be consistent with Rule 8(a)'s requirements. *Id.* at 782. Moreover, the pleading examples raised by Respondents are no more detailed or specific than Petitioners' complaint.

> The *Hammes* complaint alleged that the defendant sold "franchises in several states," and that the plaintiff franchisee "mailed substantial fees" to defendant, "contributed money to [defendant's] national advertising," and "purchased equipment and inventory" from defendant.

Resp. Br. at 9.

Petitioners' complaint is as detailed as the *Hammes* complaint which Respondents considered to be sufficiently pled. Petitioners' complaint alleged that defendants intruded "into confidential matters" and imposed " 'gag' orders to facilitate their cost-cutting measures"; defendants "met together on numerous occasions and

have, thus, had the opportunity to communicate with one another about fees and other terms of engagement . . . "; defendants "acted jointly and in concert . . . at meetings and through mailings and publications, telephone and other forms of communication . . . " Pet. Br. at 57a. The level of specificity in Petitioners' complaint is equal if not greater than the *Hammes* complaint. Thus, Petitioners complaint is as detailed and amenable to Rule 8(a) as the *Hammes* complaint which Respondents considered to have "supporting facts" sufficient to go forward. Resp. Br. at 9.

Petitioners met the "short and plain statement" requirements under Rule 8(a) and *Leatherman*. The Second Circuit's decision directly flies in the face of the Court's decision and conflicts with its brethren Circuits. Denying this petition will only leave a jurisprudence of doubt for complainants who will be unable to determine what level of specificity they must plead to find relief.

III. PETITIONERS HAVE AN ABSOLUTE RIGHT TO SUBMIT AN AMENDED COMPLAINT UNDER RULE 15(a).

Respondents incorrectly assert that Petitioners "never presented this question to any court other than this one." Resp. Br. 10-11. In fact, Petitioners requested leave to amend, under Rule 15(a), at the District Court and were summarily denied without any opportunity to plead additional facts. Pet. Br. at 40a. In addition, Petitioners also raised the issue before the Second Circuit on brief. The Second Circuit with only a cursory discussion of the issue affirmed the dismissal order.

IV. A CONFLICT CONTINUES TO EXIST BETWEEN THE CIRCUITS REGARDING THE RIGHT TO AMEND UNDER RULE 15(a).

The Second Circuit's affirmation of the order dismissing Petitioners' complaint without leave to amend directly conflicts with the Ninth Circuit's decisions holding that, "[n]either the filing nor granting of . . . a motion [to dismiss] before answer terminates the right to amend; an order of dismissal denying leave to amend at that stage is improper." *United States ex rel. Richard Saaf v. Lehman Brothers, et al.*, 123 F.3d 1307, 1308 (9th Cir. 1997) (citing *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995)).

Respondents' argument claiming that there is no conflict between the Second and Ninth Circuits relies upon cases where "the pleading could not possibly be cured by the allegation of other facts." *Cook, Perkiss and Liehe, Inc. v. Northern California Collection Service Inc.*, 911 F.2d 242, 247 (9th Cir. 1990). Respondents also rely on Ninth Circuit decisions dismissing complaints where the "movant has presented no new facts but only new theories. . . . " *Westland Water Dist. v. Firebaugh Canal*, 10 F.3d 667, 677 (9th Cir. 1993). Both cases are consistent with the Ninth Circuits decision in *Saaf* and are inapposite to the facts of this case. Here, an amended pleading could cure what the District Court regarded as inadequate. Petitioners were never given the opportunity to amend and thus, the District Court prevented any possibility of alleging additional facts. Moreover, Petitioners did not attempt to raise new theories, rather only to supplement the facts originally asserted.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed, and the case remanded for trial.

Respectfully submitted,

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